Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MORRY P. WEINSTEIN,
Petitioner,

v.

UNITED STATES OF AMERICA and
DONALD JACKSON, Special Agent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner, Morry P. Weinstein, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on June 1, 1981.

QUESTIONS PRESENTED

The questions presented for review, in terms of the unusual circumstances of the case concisely set forth in the Statement, *infra*, page 6, relate to the conduct of the proceeding before the district court in which that court ordered enforcement of certain internal revenue administrative summonses, which order was affirmed by the court of appeals, and involve violations below of fundamental constitutional standards of due process of law

calling for an exercise of this Court's power of supervision to articulate and set down a uniform procedural standard for such hearings for all circuits and districts in implementation of its decision and opinion in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978). Those questions are:

1. Whether the adversary proceeding, repeatedly referred to in this Court's several opinions governing due-process standards for judicial enforcement of internal revenue administrative summonses as the proceeding which affords the taxpayer subject of Internal Revenue Service (IRS) investigation an opportunity to plead and prove that a summons was issued by the IRS in bad faith and for an improper purpose, requires that such taxpayer, under minimum standards of procedural due process, be allowed to cross-examine the government's affiant-agents and be allowed to offer and to introduce his own proof in order to attempt to meet his heavy burden of proving institutional bad faith and improper purpose in the use of such administrative summonses.

2. Whether, in order to assure that the adversary proceeding affords the taxpayer a meaningful hearing in which to meet the heavy burden of proof described in *La Salle*, minimum standards of procedural due process further require that the taxpayer be allowed, under the Federal Rules of Civil Procedure, prehearing discovery from the government, at least within reasonable limitations defined by well-pleaded questions of fact which join the issue of institutional bad faith and improper purpose in the use of an administrative summons.

3. Whether, where a Department of Justice nontax criminal investigation or indicted case is pending against a taxpayer, the use of IRS-issued administrative summonses to secure information for purposes of such nontax criminal case violates the brightline prophylactic rule against such use and purpose articulated in this Court's prior opinions, notwithstanding that such purpose may co-exist with an IRS purpose to determine the correct tax liability of the taxpayer.

4. Whether this Court's brightline rule that it is an abuse of administrative process to use an IRS summons to gather information for a pending Department of Justice prosecution is now implicitly overruled by the 1976 Congressional enactment of Section 6103(i) of the Internal Revenue Code which authorizes ex parte application by the government to a federal court for an order authorizing the IRS to disclose gathered taxpayer return information to another federal agency for use in enforcement of nontax criminal statutes.

PARTIES TO PROCEEDING BELOW

The summons enforcement action filed in the district court named one individual and five banks as respondents. These are listed below. No named respondent took any active part, by counsel or otherwise, in the proceeding in the district court or in the court of appeals, with the exception of the Crocker National Bank which entered an appearance by counsel and filed an answer to the government's petition in the district court but otherwise remained passive. All respondents advised the district court that they were neutral in the controversy and would abide by the terms of any court order to them which became final. Petitioner was the intervenor of right in the district court and the appellant in the court of appeals. The case and controversy below and here is solely between the petitioner and the United States as the real parties in interest.

The respondents in the district court, all residing or doing business in the Northern District of California, are:

1. Charles H. Stuckey (Certified Public Accountant);
2. Crocker National Bank;
3. Gibraltar Savings & Loan Association;
4. Security Pacific National Bank;
5. Union Bank; and
6. Commercial Bank of San Francisco.

TABLE OF CONTENTS AND AUTHORITIES

CONTENTS: **PAGE**

QUESTIONS PRESENTED 1
PARTIES TO PROCEEDING BELOW 3
OPINIONS BELOW 6
JURISDICTION 6
CONSTITUTIONAL PROVISION AND STATUTES INVOLVED 6
STATEMENT OF THE CASE 6
REASONS FOR GRANTING THE WRIT 12
CONCLUSION 20
Appendix A (Opinion of Court of Appeals) 1a
(Order Denying Rehearing) 39a
Appendix B (Prehearing Order of District Court) 1b
(Excerpts of Transcript Containing Rulings at Hearing) 4b
(Order Enforcing Summonses) 11b
Appendix C (Text of Statutes) 1c

CITATIONS OF AUTHORITIES:

CASES:

Donaldson v. *United States*, 400 U.S. 517 (1971) .14,15,16,18,19
Reisman v. *Caplin*, 375 U.S. 440 (1964) 11,14,15,16
United States v. *Asay*, 614 F.2d 655 (C.A.9 1980) 12
United States v. *Bisceglia*, 420 U.S. 141 (1975) 14
United States v. *Chase Manhattan Bank*, 598 F.2d 321 (C.A.2 1979) 12
United States v. *Chemical Bank*, 593 F.2d 451 (C.A.2 1979)...12
United States v. *Church of Scientology of California*, 520 F.2d 818 (C.A.9 1975) 10,12,18
United States v. *City National Bank*, 642 F.2d 368 (C.A.10 1980) 12
United States v. *Cortese*, 614 F.2d 914 (C.A.3 1980) 12
United States v. *Davis*, 636 F.2d 1028 (C.A.5 1981) 12
United States v. *Equitable Trust Co.*, 611 F.2d 492 (C.A.4 1979) 12
United States v. *Euge*, 444 U.S. 707, (1980) 11,14
United States v. *Freedom Church*, 613 F.2d 316 (C.A.1 1979).12
United States v. *Garden State National Bank*, 607 F.2d 61 (C.A.3 1979) 12,13,18
United States v. *Genser (Genser III)*, 602 F.2d 69 (C.A.3 1979), cert. denied, 444 U.S. 928 (1979) 12, 13,18
United States v. *Genser (Genser II)*, 595 F.2d 146 (C.A.3 1979) 12,13,18

CASES: PAGE

United States v. *Goldman*, 637 F.2d 664 (C.A.9 1980) 12
United States v. *Harris*, 628 F.2d (C.A.5 1980) 12,13
United States v. *Kis*, ____ F.2d ____ (C.A.7 decided Sept. 4, 1981; 81-2 U.S.T.C. ¶ 9659) 13
United States v. *LaSalle National Bank*, 437 U.S. 298 (1978) 2,12,14,15,17,18,19,20
United States v. *Marine Midland Bank of New York*, 585 F.2d 36 (C.A.2 1978) 12
United States v. *Moll*, 602 F.2d 134 (C.A.7 1979) 12
United States v. *Moon*, 616 F.2d 1043 (C.A.8 1980) 12
United States v. *National Bank of South Dakota*, 622 F.2d 365 (C.A.8 1980) 12
United States v. *Noall*, 587 F.2d 123 (C.A.2 1978), cert. denied, 441 U.S. 923 (1979) 12
United States v. *O'Connor*, 118 F.Supp. 248 (Mass. 1953) 19
United States v. *Omohundro*, 619 F.2d 51 (C.A.10 1980) 12
United States v. *Popkin*, 623 F.2d 108 (C.A.9 1980) 12
United States v. *Powell*, 379 U.S. 48 (1964) 14,15,16,18
United States v. *Security Bank & Trust Co.*, ____ F.2d ____ (C.A.10 decided Oct. 9, 1981; 81-2 U.S.T.C. ¶ 9711) 13
United States v. *Serubo*, 604 F.2d 807 (C.A.3 1979) 12,18
United States v. *Sherman*, 627 F.2d 189 (C.A.9 1980) 12
United States v. *Southeast First National Bank of Miami Springs*, ____ F.2d ____ 81-2 U.S.T.C. ¶ 9666) 13
United States v. *Southern Tanks, Inc.*, 619 F.2d 54 (C.A.10 1980) 12

STATUTES:

Internal Revenue Code of 1954 (26 U.S.C.):
SEC. 6103 ..... 3,6,7,8,20,1c
SEC. 7402 15
SEC. 7602 ..... 6,7,16,6c
SEC. 7604 ..... 6,8,15,7c
SEC. 7609 ..... 6,7,8,7c
21 U.S.C., Chap. 13, Pt. D. 6
28 U.S.C.:
SEC. 1254 6
SEC. 1291 9
SEC. 1746 8
SEC. 2101 6

MISCELLANEOUS:

Note, *The Institutional Bad Faith Defense to the Enforcement of IRS Summonses*, 80 Colum. L. Rev. 621 (1980) 13
Revised Rules of the Supreme Court of the United States:
Rule 17.1 13
Rule 20.4 6

OPINIONS BELOW

There was no formal opinion by the district court. Excerpts of the transcript of the hearing in that court, covering the district judge's rulings prior to granting enforcement of the summonses, are reproduced in Appendix B, *infra*, together with that court's prehearing order containing the judge's opinion on the issues joined for hearing and the written order enforcing the summonses.

The opinion of the court of appeals (Appendix A, *infra*) is officially reported at 646 F.2d 1369.

JURISDICTION

The judgment of the court of appeals (Appendix A, *infra*) was entered on June 1, 1981. Appellant's petition for rehearing and suggestion of appropriateness of rehearing en banc was denied and rejected by order of that court entered on August 28, 1981. Jurisdiction of this Court is conferred by 28 U.S.C. §§ 1254(1) and 2101(c), and Revised Rule 20.4.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves the Due Process Clause of the Fifth Amendment of the Constitution of the United States and §§ 6103, 7602, 7604, 7609 of the Internal Revenue Code of 1954, as amended (Title 26 United States Code). The statutory sections are set forth in pertinent text in Appendix C, *infra*.

STATEMENT OF THE CASE

In 1978, petitioner, a practicing tax attorney, was arrested by agents of the federal Drug Enforcement Administration (DEA) and was thereafter charged by grand jury indictment with offenses under Chap. 13, Pt. D. of 21 U.S.C. to which he pleaded not guilty. On the day of his arrest, while in custody, alone and without counsel, he was interviewed by IRS agents outside of the presence of any DEA agents. He answered their questions about his then financial and tax status. Action taken by DEA agents shortly after that IRS interview revealed that

his answers to certain questions had been promptly and improperly communicated by the IRS agents, without court order, to the DEA agents, in violation of 26 U.S.C. § 6103(a) and (i).

While the criminal indictment of petitioner was awaiting trial, the federal prosecuting attorney handling the case conferred with IRS management-level officials, and the IRS thereafter formally opened a criminal tax investigation of petitioner, who had not theretofore been subjected to any civil examinations of his tax returns for the previous four years. When notified of the criminal tax investigation, petitioner immediately offered to the IRS his willingness to cooperate in any civil examination of his tax returns but stated his intention not to cooperate in any criminal tax investigation under the dubious circumstances of purpose surrounding the Justice Department's pending nontax criminal case. The IRS refused to withdraw or suspend its criminal investigation pending disposition of the nontax criminal case. After the prosecutor had informed the assigned IRS Criminal Investigation Division agent that he "just didn't have enough evidence to take to a jury right now," he caused the criminal (DEA) indictment against petitioner to be dismissed "without prejudice," just before trial, advising petitioner's counsel that the DEA investigation would continue.

The IRS thereafter began to issue and serve multiple administrative summonses, under 26 U.S.C. § 7602, to third-party recordkeepers (see 26 U.S.C. § 7609(a)(3), Appendix C, *infra*) who were clients, accountants, attorneys and financial institutions with whom petitioner had had transactions, seeking the production of records and testimony in its investigation of petitioner. Each summons issued had typed on it in two places that it was returnable to the IRS "Criminal Investigation Division," which was an extraordinary deviation from normal IRS practice, not mandated by any regulation or internal rule. Petitioner gave notices to all summonees that the summonses should not be complied with, pursuant to his rights to secure judicial review of such administrative process under 26 U.S.C. §7609. At the same time that the first group of IRS summonses were being issued, the prosecutor applied ex parte, under 26

U.S.C. § 6103(i), and was granted an order by a district judge (other than the judge who had been assigned and had dismissed the DEA case against petitioner) authorizing the IRS to turn over to him information gathered in its tax investigation of petitioner for the prosecutor's use in his continuing DEA investigation.

The IRS thereafter requested the Department of Justice to bring a proceeding for judicial enforcement of seven of the over-30 summonses that it had issued and served. The present case was then commenced by the government's petition under 26 U.S.C. § 7604(a) in the same district court, but filed by a different assistant United States Attorney than the DEA-case prosecutor and assigned to a different district judge than the DEA-case judge, despite petitioner's application that the summons case was related to the criminal case and should be assigned to the same judge under local related-case rules. Petitioner was ordered intervenor of right in the proceeding under 26 U.S.C. § 7609(b)(1) and filed his answer to the government's petition raising specific affirmative defenses of abuse of process, comprising: (1) no legitimate civil-tax-determination purpose in the inception and continuation of the criminal tax investigation where there had been no foundational civil examination and petitioner had offered his cooperation in a civil examination, which the IRS had rejected; (2) an improper purpose to gather information, by issuance and enforcement of the administrative summonses to third parties, to be turned over to and used by the Department of Justice in its nontax criminal case; and (3) an improper purpose, at all events, to harass the petitioner in the conduct of his profession as a practicing tax attorney by the extraordinary manner in which the multiple summonses were drawn, issued and served upon his clients and others.

Prior to the initial district court hearing on the order to show cause why the summonses should not be enforced, factual issues were joined upon the written declarations (28 U.S.C. § 1746) of petitioner's attorney countered by the declarations of five government officers (three IRS, one DEA, and the criminal case prosecutor). At the initial hearing on September 7, 1979, the district court filed an order finding that the declarations

"raise sufficiently serious questions to merit a hearing in this case," but denied petitioner's request to be allowed limited prehearing discovery of government witnesses and documents and held that the hearing "would be limited to an examination of the persons who have offered affidavits in support of the petition" and that the "court will then determine on the basis of its observations whether further inquiry into the Service's purposes in warranted." (Appendix B, *infra.*)

At the subsequent hearing on September 21, 1979, which petitioner believed was to be a prediscovery hearing only, the court rejected petitioner's offer to go forward with evidence to meet his burden of proof, stated that it did not wish to hear any testimony from taxpayer, directed government counsel to examine the petitioning IRS special agent, and then interrupted and cut off petitioner's counsel's cross-examination of the special agent who had commenced the investigation and had issued the summonses. The court terminated the hearing by ordering enforcement of the summonses from the bench without hearing any further witnesses, offers of proof or argument of counsel. Petitioner was allowed to make an offer of proof in writing to complete the record only after the entry of the court's written enforcement order and prior to the filing of his notice of appeal. (Appendix B, *infra.*)

Jurisdiction of the appeal was pursuant to 28 U.S.C. § 1291. The court of appeals, after ordering a stay of the district court's order (overruling the lower court's denial of a stay), ordered expedited briefing and oral argument of the appeal. The appeal was submitted for decision on April 16, 1980; 13 months later, the 25-printed-page split decision (comprising three separate opinions of the three-judge panel, one dissenting) and judgment affirming the district court order was entered on June 1, 1981. (Appendix A, *infra.*)

The majority opinion holds that, while a taxpayer must in a summons enforcement proceeding prove the "illegitimacy" of purpose of the IRS's investigation of him, and he may have a limited hearing in order to determine if he may discover evidence from the government by which to prove it, at such prediscovery hearing the judge may exercise his discretion to order the summonses enforced without letting the taxpayer

present any evidence or even to cross-examine the government's declarant-witnesses who have attested to the legitimacy of the IRS's purposes. The majority in effect thus holds that the hearing judge may refuse to allow a true adversary hearing and does not abuse discretion in denying cross-examination nor in refusing to receive evidence from the party having the burden of proof. It states that it found nothing in the record to conclude that the judge's order enforcing the summonses was based on insufficient evidence (i.e., was clearly erroneous). It concludes that the petitioner "*failed to prove*" his contentions that the summonses were issued in bad faith in aid of a criminal prosecution, for no legitimate tax determination purpose, and for purposes of harassment. The majority's basis for decision appears to be its statement (Appendix A, *infra*, pp. 8a-9a) that: "Even the co-existence of an improper purpose would not prevent summons enforcement if the existence of a legitimate purpose was not rebutted by the taxpayer."

The concurring opinion by Judge Merrill added that he found it entirely appropriate that the IRS gather information by summons and share it with the DEA because the statutory provision allowing an ex parte disclosure order makes it proper.

The long and careful dissenting opinion of Judge Wyatt reviews the record in the district court and vigorously states conclusions of constitutional dimension opposite from the majority (Appendix A *infra*, pp. 12a-13a, 37a-38a):

> The procedure followed in the District Court was in my opinion wrong and was contrary to the controlling guidance in *United States* v. *Church of Scientology, etc.*, 520 F.2d 818 (9th Cir. 1975); *the procedural errors of the district Court—particularly the refusal to permit appellant Weinstein to present evidence—denied appellant elementary due process and violated his constitutional rights.* * * *
>
> * * *
>
> The procedure followed below as to discovery was contrary to that specified in *Scientology* and contrary to the District Court's own order filed September 7, 1979. It was an abuse of discretion, in my view, to deny any discovery to appellant. The circumstances were unusual, to say the least, and strongly suggested the necessity of a thorough exploration.

As a matter of substantive law, the District Court committed error in denying appellant his right to "challenge the summons" on the "appropriate ground" that the "material was sought for the improper purpose of obtaining evidence for use in a criminal prosecution...." [*Reisman* v. *Caplin*] (375 U.S. at 449, 84 S.Ct. at 513). Not quite a year ago, in what seems to have been its latest repetition of the established principle, the Supreme Court declared that a person in the position of Weinstein "is entitled to challenge the issuance of the summons in an adversary proceeding in federal court prior to enforcement, and may assert appropriate defenses." *United States* v. *Euge*, 444 U.S. 707, 719, 100 S.Ct. 874, 882, 63 L.Ed.2d 141 (February 20, 1980).

To order enforcement of the summonses after an arbitrary denial of elementary due process, as I see it, was a grave mistake.

It seems especially unfair to justify enforcement on the ground that Weinstein failed to meet his burden of proof when he was denied in the District Court his right to present evidence.

I would reverse the order appealed from and would remand with instructions to grant appropriate discovery to appellant, to afford appellant an adequate adversary hearing, and to determine on a more complete record whether the summonses should be enforced.

[Emphasis added]

The court of appeals' order of August 28, 1981, denying the petition for rehearing and rejecting the suggestion of appropriateness of rehearing en banc, stated that the full court had been advised of the en banc suggestion and no judge of the court had requested a vote on it.

REASONS FOR GRANTING THE WRIT

This case presents to the Court the now-ripe opportunity to review and correct the considerable substantive and procedural disarray that has been engendered over the past three years by a multitude of IRS summons enforcement cases in which the federal courts have attempted to apply criteria set forth by this Court in *United States* v. *LaSalle National Bank*, 437 U. S. 298 (1978), respecting the limits and requirements of proper judicial inquiry in such proceedings. Since *LaSalle*, several circuit courts of appeals have articulated procedural standards for such proceedings, but the results have not been uniform. Many decisions have been *ad hoc*, and limited to the specific case, without setting overall consistent standards. And many opinions have mentioned that this Court has given no procedural guidance in or since *Lasalle*.[1]

With the decision of the Ninth Circuit in this case, and now viewing three more circuits' opinions treating procedure in this area which have been handed down since the Ninth Circuit

[1] See: First Circuit: *United States* v. *Freedom Church*, 613 F.2d 316 (1979). Second Circuit: *United States* v. *Chase Manhattan Bank*, 598 F.2d 321 (1979); *United States* v. *Chemical Bank*, 593 F.2d 451 (1979); *United States* v. *Noall*, 587 F.2d 123 (1978), cert. denied, 441 U.S. 923 (1979); *United States* v. *Marine Midland Bank of New York*, 585 F.2d 36 (1978). Third Circuit: *United States* v. *Cortese*, 614 F.2d 914 (1980); *United States* v. *Garden State National Bank*, 607 F.2d 61 (1979); *United States* v. *Serubo*, 604 F.2d 807 (1979); *United States* v. *Genser* (*Genser III*), 602 F.2d 69 (1979), cert. denied, 444 U.S. 928 (1979); *United States* v. *Genser* (*Genser II*), 595 F.2d 146 (1979). Fourth Circuit: *United States* v. *Equitable Trust Co.*, 611 F.2d 492 (1979). Fifth Circuit: *United States* v. *Davis*, 636 F.2d 1028 (1981); *United States* v. *Harris*, 628 F.2d 875 (1980). Seventh Circuit: *United States* v. *Moll*, 602 F.2d 134 (1979). Eighth Circuit: *United States* v. *National Bank of South Dakota*, 622 F.2d 365 (1980); *United States* v. *Moon*, 616 F.2d 1043 (1980). Ninth Circuit: *United States* v. *Goldman*, 637 F.2d 664 (1980) *United States* v. *Sherman*, 627 F.2d 189 (1980); *United States* v. *Popkin*, 623 F.2d 108 (1980); *United States* v. *Asay*, 614 F.2d 655 (1980). Tenth Circuit: *United States* v. *City National Bank & Trust Co.*, 642 F.2d 388 (1981); *United States* v. *Southern Tanks, Inc.*, 619 F.2d 54 (1980); *United States* v. *Omohundro*, 619 F.2d 51 (1980).

opinion here,[2] it is clear that the circuits are in conflict.[3] There is presently unequal treatment of the substantive and procedural rights of taxpayers in summons enforcement proceedings in different circuits, which, we urge, now calls for an exercise of this Court's power of supervision to state procedural standards to be followed in such proceedings. Revised Rule 17.1(a).

We also submit that, upon the extraordinary factual circumstances and record in this case, as hereinabove set forth and as thoroughly exposed in the dissenting opinion of Judge Wyatt below (Appendix A, *infra*, pp. 12a-38a), it is further the case here that the Ninth Circuit has sanctioned a departure by the district court from the accepted and usual course of judicial proceedings so far as to call for an exercise of this Court's power of supervision, independently of the conflict between circuits. *Ibid.* The primary question presented on this ground for granting the writ is whether the "hearing" afforded to the

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[2] Seventh Circuit: *United States* v. *Kis* (and consolidated cases), ____ F.2d ____ (decided Sep. 4, 1981; 81-2 U.S.T.C. ¶ 9659); Fifth Circuit: *United States* v. *Southeast First National Bank of Miami Springs*, ____ F.2d ____ (decided Aug. 11, 1981; 81-2 U.S.T.C. ¶ 9666); and Tenth Circuit: *United States* v. *Security Bank & Trust Co.*, ____ F.2d ____ (decided October 9, 1981; 81-2 U.S.T.C. ¶ 9711).

[3] The Seventh Circuit in *Kis* (*supra*, n. 2), has expressly exercised its supervisory powers to set specific procedures and hearing standards to be followed by the district courts in summons cases in that circuit, which fairly allow a challenging taxpayer to develop by limited discovery and to present proof of bad faith preliminary to the holding of an adversary hearing. The Seventh Circuit has looked to and expanded upon procedures and standards articulated and set by the Third Circuit (*Garden State National Bank*, and *Genser II & III*, *supra*, n. 1) and by the Fifth Circuit (*Harris*, *supra*, n. 1). The Fifth Circuit, in *Southeast Bank* (*supra*, n. 2), has now clearly stated that a challenging taxpayer must always, at a minimum, be allowed at an adversary hearing to discover the nature of any contacts between the IRS investigators and Department of Justice officials. The First, Second, Fourth, Eighth and Tenth Circuits (*supra*, n. 1) have each recognized that limited discovery before the hearing, or cross-examination of produced government witnesses at the adversary hearing, is required for a fair judicial inquiry into well-pled allegations of IRS bad faith. The Ninth Circuit has now ruled in this case that its standards of fair judicial inquiry are satisfied by denial of discovery and denial of cross-examination at a hearing, if the district court is satisfied that the investigating agents had any legitimate purpose in issuing the summonses, without allowing development of evidence indicating the existence of IRS bad faith and improper purpose. Compare, Note, *The Institutional Bad Faith Defense to the Enforcement of IRS Summonses*, 80 Colum. L. Rev. 621 (1980).

petitioner in the district court, as underwritten by the appellate court, was a meaningful "adversary" hearing consonant with this Court's long-existing holdings in the area of IRS summons enforcement.[4]

The Ninth Circuit's disposition of this case comprises, first of all, a direct violation of the Court's holding in *LaSalle* because of the way the questions of fact and law were treated by both courts below. The circumstances are the obverse of those presented in *LaSalle:* There, the finding of fact below was that the investigating agent was motivated by bad faith and improper "sole" criminal purpose; the court of appeals applied a "clearly erroneous" review standard; and this Court held that such standard comprised "legal error" when the inquiry was limited to personal motivation of the agent (437 U.S., at 319, n. 21). Here, the district court's only articulated factual finding was that there was "no bad faith on [the] part" of the only two agents who were allowed to testify (Appendix B, *infra,* p. 10b); cross-examination was denied; petitioner was not allowed to present any evidence; and the court of appeals applied a "clearly erroneous" standard, holding that the lower court's finding of no bad faith was not clearly erroneous and that petitioner "failed to prove" improper purpose, without regard to the clear circumstances that the inquiry below was not truly adversary. It is clear that the Ninth Circuit has erred as a matter of law, equally and for the same reasons that this Court held the Seventh Circuit to have erred in *LaSalle.*[5]

In the narrowest focus, it is clear on the record in this case, as concluded in Judge Wyatt's cogent dissent (Appendix A, *infra,* pp. 28a-33a): that petitioner was not afforded the *meaningful adversary* hearing upon the joined issues of IRS good faith which this Court's decisions demand; that he was therefore denied elementary due process; and that, at the

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[4] *Reisman* v. *Caplin*, 375 U.S. 440 (1964); *United States* v. *Powell*, 379 U.S. 48 (1964); *Donaldson* v. *United States*, 400 U.S. 517 (1971); and *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978). See also, *United States* v. *Bisceglia*, 420 U.S. 141 (1975); and *United States* v. *Euge*, 444 U.S. 707 (1980).

[5] See discussion of *LaSalle*, *infra*, p. 17.

minimum, the Court might here grant the writ and summarily reverse and remand with instructions to the district court to conduct a proper hearing. We urge, however, that the Court take this case for full consideration of the important issues it presents as to the enforcement of the internal revenue laws in view of the existing conflict among the circuits as to the procedure to be followed in the conduct of proper hearings in adversary summons enforcement proceedings. (See the reasons stated for granting certiorari in *LaSalle, supra*, 437 U.S., at 305, and in *Donaldson, supra*, 400 U.S., at 522.)

A brief review of the Court's prior decisions pertinent to the questions presented in this case will assist the Court in deciding whether to grant the petition:

In the first case ever reviewed by the Court concerning the substantive and procedural rights of parties subject of an internal revenue administrative summons (*Reisman* v. *Caplin*, 375 U.S. 440 (1964)), it was held (at 449) that a summoned witness (or an intervening taxpayer-subject of investigation, if he is not the summonee) is entitled to a "hearing" before a district court in a proceeding brought by the government to invoke the court's process to enforce the summons under 26 U.S.C. §§ 7402(b) and 7604(a). It was further held that in such hearing the witness or taxpayer "may challenge the summons on any appropriate ground," including (by way of illustration) the raising of the defense "that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution."

In the following Term, in *United States* v. *Powell*, 379 U.S. 48, 58 (1964), the Court further emphasized the substantive right to a hearing, describing it as an "adversary hearing to which the taxpayer is entitled before enforcement is ordered," and, citing *Reisman, supra*, stating that "[a]t the hearing he may challenge the summons on any appropriate ground." The Court also made clear, by negative implication, addressing the facts before it, that the "adversary hearing" is not to be "meaningless," and thus must be *meaningful*, and that the hearing court may "inquire into the underlying reasons for the IRS examination," because:

> *It is the court's process which is invoked to enforce the administrative summonses and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. The burden of showing an abuse of the court's process is on the taxpayer* * * *.*
>
> [Footnote omitted; emphasis added]

By the 1970 Term, under a burgeoning volume of lower court summons cases in which taxpayers contended that *Reisman* and *Powell* meant that any use of a summons in a criminal tax investigation was a proscribed "improper purpose," the circuits had come into conflict in their interpretations. The Court undertook in *Donaldson* v. *United States,* 400 U.S. 517, 533 (1971), to clarify the above-quoted language in *Reisman.* It held that, "in proper focus," the reference to the impropriety of purpose in using a summons to obtain evidence for use in a criminal prosecution was "applicable to the situation of *a pending criminal charge* or, at most, of an investigation *solely* for criminal purposes." The opinion concluded (400 U.S., at 536):

> We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued *in good faith* and prior to a recommendation for criminal prosecution.
>
> [Emphasis added]

Not surprisingly, use of the words and phrases "solely for criminal purposes" and "issued in good faith" in *Donaldson* did not stem the torrent of summons litigation in which taxpayers alleged bad faith issuance of summonses and sole criminal purpose by the IRS.

By the 1977 Term, the Court believed it was again necessary to review the subject because of further conflicts among the circuits in interpretations of *Donaldson.* The

question was whether judicial inquiry into alleged IRS improper purpose or IRS good faith was controlled and limited by facts of when and by whom and to whom a "recommendation for criminal prosecution" of a tax case was made. In *United States* v. *LaSalle National Bank, supra,* the Court was squarely faced with deciding the parameters of the "good faith" inquiry, upon a record in which the district court had found as a fact that the IRS criminal investigator had issued the subject summonses "solely for the purpose of unearthing evidence of criminal conduct." That court had therefore denied enforcement, and the court of appeals affirmed because it held the lower court's factual finding not to be clearly erroneous. (437 U.S., at 307-308.)

In its 5-4 decision reversing the lower courts in *LaSalle,* the Court was divided on the question of the limits of the proper judicial inquiry, with the majority holding that "good faith" or "solely criminal purpose" could not be decided only upon the motivation and intention of the investigating agent, but called for a broader "examination of the institutional posture of the IRS." (437 U.S., at 316.) After an exhaustive review, restatement and analysis of the development of the Court's opinions spanning 14 years of summons litigation, the holding of the majority should have left no doubt in the lower courts that the heavy burden of proof on a person opposing enforcement of a summons requires that the adversary hearing must allow him a meaningful opportunity to present such proof. (See 437 U.S. at 316-318, notes 18. 19 and 20.)

In the three years since *LaSalle,* the volume of summons cases appears not to have abated, and the dour prophecy of Justice Stewart in dissent (at 320)—"The elusiveness of 'institutional good faith' as described by the Court can produce little but endless discovery proceedings and ultimate frustration of the fair administration of the Internal Revenue Code"—may have been fulfilled; at least respecting frustration of the fair administration of the law. What appears to have happened is that the lower federal courts, perhaps overburdened and vexed

with "summary"[6] summons enforcement proceedings and in fear of the specter of "endless discovery," have fashioned procedural limitations and restrictions which impinge on the nature of an adversary proceeding and which, at all events, now vary from circuit to circuit, casting a cloud over the uniform fair administration of such proceedings.

The Ninth Circuit, in this case, has in effect gutted the basic due-process principles of the adversary proceeding by its unwillingness to apply properly and expand its 1975 procedural decision in *United States* v. *Church of Scientology of California,* 520 F.2d 818, in view of this Court's *LaSalle* decision.[7] It has instead, in this case, elevated and underwritten lower court discretion so far as to deny altogether an adversary hearing to a taxpayer who well pleads and joins factual issues in his case challenging IRS good faith.

The unique factual context of this case shows at its core the fundamental "brightline," which even the dissenting Justices in *LaSalle* recognized to be the boundary of impropriety in the use of administrative summonses: a pending, nontax criminal prosecution against the taxpayer in which the known circumstances of IRS-Justice Department contacts respecting the gathering and supplying of information by the IRS to the Justice Department cry out for full and in-depth judicial inquiry. This case presents to the Court the real factual context

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[6] This Court in *Powell* (379 U.S. at 58, n. 18) observed that a summons enforcement proceeding under 26 U.S.C. § 7604(a) was governed by the Federal Rules of Civil Procedure, and suggested that it was to be commenced by the filing of a complaint, followed by an answer and hearing. In *Donaldson*, however, the Court recognized that the proceeding could be summary in nature (an order to show cause issued upon a petition for enforcement) rather than plenary (a complaint and answer) "so long as the rights of the party summoned are protected and an adversary hearing, if requested, is made available." (400 U.S., at 529). See *United States* v. *Church of Scientology of California*, 520 F.2d 818 (C.A.9 1975), where the Ninth Circuit recognized that the procedural distinction between a summary and plenary proceeding should not interfere with the right to the adversary hearing.

[7] It was urged in petitioner's briefing below, and in particular at the April 1980 oral argument of the appeal, that the court should seize the opportunity in this case to articulate and set procedural standards for discovery and hearings in summons cases for the district courts of the circuit, as the Third Circuit had by that time done in the *Genser, Serubo* and *Garden State* cases (*supra*, n. 1).

of *United States* v. *O'Connor,* 118 F.Supp. 248 (Mass. 1953), which has repeatedly been cited by the Court to show the boundary of improper purpose in use of administrative process "to trench on the power of the grand jury or to broaden the Government's right to discovery in a criminal case." *LaSalle, supra,* at 321, Stewart, J., dissenting; and at 306. See also *Donaldson, supra,* at 533.

If the petitioner here had been afforded the rights to develop by discovery and to present his proof at hearing, and if he had there met his "heavy" burden of showing IRS "institutional" bad faith in the connivance of its management-level officials with the Justice Department prosecutor, showing that the rational purpose of the tax investigation and the issuance of IRS summonses was to aid the prosecutor in developing evidence against petitioner, or that the purpose was simply to *harass* and destroy petitioner as a practicing tax attorney, then the principles of *LaSalle* clearly do not require him further to *rebut* "the existence of a legitimate purpose" of civil tax determination in order to prevent enforcement, as the Ninth Circuit majority opinion erroneously holds. (Appendix A, *infra,* p. 9a. See part 5 of Judge Wyatt's dissent on this point, *id.* pp. 24a-27a, which correctly states what this Court held and intended in *LaSalle.*) The Ninth Circuit's holding, if allowed to stand uncorrected, imposes not a "heavy" but an impossible burden of proof upon a taxpayer in petitioner's position. It constitutes an erroneous subversion of the *LaSalle* definition of what the good-faith inquiry requires, and it should be corrected by the Court upon the granting of the writ in this case.

Finally, the concurring opinion in this case suggests that it is perfectly proper to use the IRS to gather information under administrative summonses to be turned over to the Justice Department for purposes of a pending *nontax* criminal prosecution because a statute allows such disclosure under an ex parte court order. (Appendix A, *infra,* p. 12a. See Judge Wyatt's dissent on this point, *id.,* p. 27a.) Can such view be squared with this Court's clear mandate in *LaSalle* (at 317)?: "*Similarly, the good-faith standard will not permit the IRS to become an information-gathering agency for other departments, including the Department of Justice, regardless of the status of*

criminal cases." This case, in total context, thus presents that further important question for review, and we urge the Court to take it upon granting the writ. Without mounting argument here, we observe only that it is inconceivable that Congress, in enacting the revised and more restrictive provisions of 26 U.S.C. § 6301(i) in 1976, had any intention thereby to overrule this Court's brightline rule against the improper use of IRS summonses. The legislative history nowhere mentions or suggests that such intent had any part in the legislation. Yet the Ninth Circuit has here indicated that it is willing to recognize such effective overruling of this Court's long-standing rule without regard to consideration of legislative intent. This dangerous and confusing suggestion should be corrected by the Court in this case.

CONCLUSION

For all of the foregoing reasons, we respectfully urge the Court to grant this petition and upon writ of certiorari to review once again this area of federal tax litigation which has in recent history become so burdensome to the federal courts. We urge the Court to consider and to prescribe in this case fair procedural standards for the conduct of adversary proceedings in IRS summons enforcement cases. We submit that the Court's statutory responsibility over the federal courts, in view of the conflicting applications of its decision in *LaSalle*, requires that it now exercise its power of supervision, and that this case comes to it at an appropriate time and with a clear record of denial of due process and justice below calling for exercise of that power.

Respectfully submitted,

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November 24, 1981

APPENDIX A

UNITED STATES of America and Donald Jackson, Special Agent, Petitioner/Appellees

v.

Charles H. Stuckey et al., Respondents,

and

Morry Weinstein, Intervenor-Appellant.

No. 79-4691.

United States Court of Appeals, Ninth Circuit,

Argued and Submitted April 16, 1980.

Decided June 1, 1981.

Appeal from the United States District Court for the Northern District of California.

Before MERRILL and SKOPIL, Circuit Judges, and WYATT,* District Judge.

SKOPIL, Circuit Judge:

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* Honorable Inzer B. Wyatt, Senior United States District Judge of the Southern District of New York, sitting by designation.

INTRODUCTION

Weinstein appeals a district court's order enforcing administrative tax summonses issued pursuant to 26 U.S.C. § 7602. Weinstein failed in district court to prove his contention that the summonses were issued in bad faith in aid of a criminal prosecution. On appeal he argues that he failed because the district court improperly denied his request for discovery and abused its discretion in limiting the evidentiary proceedings.

We affirm.

FACTS

Morry Weinstein is a tax attorney who was arrested along with others by agents of the Drug Enforcement Administration (DEA) for alleged possession of hashish. The agents seized drugs, cash and various bank receipts. The DEA immediately notified the Internal Revenue Service (IRS) of the arrests.

Weinstein was indicted and pleaded not guilty to the drug offense. Prior to trial certain evidence unrelated to Weinstein was ordered suppressed. Weinstein's indictment was dismissed without prejudice. After dismissal of Weinstein's indictment, the Assistant U. S. Attorney, acting pursuant to 26 U.S.C. § 6103(i), obtained an *ex parte* order that allowed him access to information gathered by the IRS in its investigations.

Weinstein was interviewed by an IRS revenue agent after his drug arrest. The revenue agent referred the case to the Criminal Investigation Division of the IRS because of certain allegedly false statements made by Weinstein. Weinstein claimed to have filed tax returns for 1975 and 1976 but the revenue agent found no record of those returns.

The investigation was assigned to Thomas Utaski, a special agent, who issued all but one of the summonses at issue in this appeal. A second special agent, Donald Jackson, later took over the investigation and issued the other summons. The summonses were directed to various individuals and banks and requested Weinstein's financial records.

Weinstein exercised his right provided by 26 U.S.C. § 7609 by requesting that the third parties summoned not provide information. This action was commenced in district court when Jackson filed a petition to enforce the summonses. Weinstein was granted permission to intervene in the enforcement action.

Weinstein raised several affirmative defenses in opposition to enforcement. He argued that the IRS issued the summonses to harass him and to aid the DEA in its non-tax criminal investigation. He submitted declarations in support of his arguments. The government filed declarations of five agents and officers in support of enforcement. The district court concluded that Weinstein raised sufficiently serious questions to warrant an evidentiary hearing. The hearing was to "be limited to an examination of the persons who have offered affidavits [sic] in support of the petition." The court stated that based on its observations at that hearing, it would determine if further inquiry would be conducted and whether Weinstein would be allowed limited discovery. Weinstein's request for pre-hearing discovery was denied.

The hearing was held as scheduled. Weinstein's witnesses were available to support his affirmative defenses. The district court limited the hearing by allowing testimony from only the two summoning agents. Weinstein was allowed to conduct full cross-examination of Jackson but was interrupted before completing cross-examination of Utaski. The district court at that point stated:

> "I am going to cut the hearing off at this particular juncture. The purpose of the hearing is to sift out the evidence, if there is any, of harassment or improper purpose that can be substantiated to avoid dilatory or discovery matters and to see whether or not the purpose of the summons[es] were to assist the government. And we have had both the people on the stand that have issued the summons[es] and I find no bad faith on their part, nor any purpose to assist the government in the drug case. And, thereby the court orders the government's Petition for Enforcement of Summons[es] is granted".

Weinstein objected to the termination of the proceedings and requested that he be allowed to make an offer of proof. The court granted that request.

In his offer of proof Weinstein contended that he could have demonstrated certain "extraordinary aberrations from usual IRS administrative procedure" from which the court could have reasonably inferred institutional bad faith. Weinstein argued that to achieve that goal he should have been allowed to question persons who submitted declarations and to question two other IRS employees with knowledge of the investigation.

The court, in enforcing the summonses, stated that it considered all the declarations submitted as well as the testimony of the agents. The court concluded that the summonses were issued in good faith since the IRS was not acting to gather information for the Department of Justice.

A motion to stay enforcement of the order was denied by the district court. This court, however, stayed the enforcement pending appeal. Our jurisdiction is predicated on 28 U.S.C. § 1291.

DISCUSSION

The proceeding to enforce an IRS summons is an adversary proceeding. *United States* v. *Asay*, 614 F.2d 655, 661 (9th Cir. 1980). The taxpayer is entitled to challenge the summonses on any appropriate ground. *United States* v. *Freedom Church*, 613 F.2d 316, 319 (1st Cir. 1979). The taxpayer, however, carries a heavy burden of convincing the district court to deny enforcement. The taxpayer must, in fact, be able to provide a minimal amount of evidence just to entitle him or her to an evidentiary hearing. *E.g., United States* v. *Popkin*, 623 F.2d 108 (9th Cir. 1980).

We are asked on this appeal to determine if the trial court erred in denying pre-hearing discovery and in limiting the scope of the evidentiary proceeding. We must also review the district court's decision to enforce the IRS summonses.

Our task is one of balancing competing interests.[1] On one hand is the government's interest in summary proceedings designed to expedite tax collection. On the other hand is the taxpayer's right to protection from the improper use of the Internal Revenue Service's summons powers. We are aided in our task by an abundance of recently decided appellate cases[2] and by several excellent district court opinions.[3]

1. Standard of Review

The district court has discretionary authority to limit the scope of an evidentiary hearing and to deny discovery in a summons enforcement proceeding. *E.g., United States* v. *National Bank of South Dakota,* 622 F.2d 365, 367 (8th Cir. 1980). The Federal Rules of Civil Procedure apply to such proceedings and rule 81(a)(3) allows for such flexibility, particularly in proceedings which are intended to be summary

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[1] *See* Note, *The Institutional Bad Faith Defense to the Enforcement of IRS Summons,* 80 Columbia L.R. 621 (1980) and Note, *Discovery in the IRS Summons Enforcement Proceedings: Less Certain than Death and Taxes,* 31 U.Fla.R. 321 (1979).

[2] *E.g., United States* v. *Harris,* 628 F.2d 875 (5th Cir. 1980); *United States* v. *Sherman,* 627 F.2d 189 (9th Cir. 1980); *United States* v. *Popkin,* 623 F.2d 108 (9th Cir. 1980); *United States* v. *National Bank of South Dakota,* 622 F.2d 365 (8th Cir. 1980); *United States* v. *Southern Tanks, Inc.,* 619 F.2d 54 (10th Cir. 1980); *United States* v. *Omohundro,* 619 F.2d 51 (10th Cir. 1980); *United States* v. *Cortese,* 614 F.2d 914 (3d Cir. 1980); *United States* v. *Asay,* 614 F.2d 655 (9th Cir. 1980); *United States* v. *Freedom Church,* 613 F.2d 316 (1st Cir. 1979); *United States* v. *Equitable Trust Co.,* 611 F.2d 492 (4th Cir. 1979); *United States* v. *Garden State National Bank,* 607 F.2d 61 (3d Cir. 1979); *United States* v. *Serubo,* 604 F.2d 807 (3d Cir. 1979); *United States* v. *Genser (Genser III),* 602 F.2d 69 (3d Cir.), *cert. denied,* 444 U.S. 928, 100 S.Ct. 269, 62 L.Ed.2d 185 (1979); *United States* v. *Chase Manhattan Bank,* 598 F.2d 321 (2d Cir. 1979); *United States* v. *Genser (Genser II),* 595 F.2d 146 (3d Cir. 1979); *United States* v. *Chemical Bank,* 593 F.2d 451 (2d Cir. 1979); *United States* v. *Noall,* 587 F.2d 123 (2d Cir. 1978), *cert denied,* 441 U.S. 923, 99 S.Ct. 2031, 60 L.Ed.2d 396 (1979); *United States* v. *Marine Midland Bank of New York,* 585 F.2d 36 (2d Cir. 1978).

[3] *E.g., United States* v. *Dahlstrum,* 493 F. Supp. 966 (C.D.Cal.1980); *United States* v. *Ryan,* 485 F.Supp. 1285 (S.D.N.Y. 1980); *United States* v. *Ladd,* 471 F.Supp. 1150 (N.D. Tex. 1979).

in nature. *United States* v. *Church of Scientology of California,* 520 F.2d 818, 821 (9th Cir. 1975). Our review of the district court's procedural rulings is limited to determining if the court abused its discretion.

We are less clearly guided as to our review of the district court's conclusion in this case that the summonses were not issued in bad faith. *See United States* v. *LaSalle National Bank,* 437 U.S. 298, 319, n.21, 98 S.Ct. 2357, 2368, n.21, 57 L.Ed.2d 221 (1978) (noting the discussion by several circuit courts of the factual and legal issues involved in enforcement proceedings but declining to resolve the standard of review question). This circuit has recently adopted the clearly erroneous standard for review of the district court's decision to deny enforcement of an IRS summons. *United States* v. *Goldman,* 637 F.2d 664, 666 (9th Cir. 1980). *See also United States* v. *Asay,* 614 F.2d 655, 661 (9th Cir. 1980); *United States* v. *Coopers & Lybrand,* 550 F.2d 615 (10th Cir. 1978). *Cf. United States* v. *Cortese,* 614 F.2d 914 (3d Cir. 1980) (rejecting the clearly erroneous and adopting a *de novo* review). We will not disturb the trial court's decision to enforce the summonses in this case unless the finding of good faith was clearly erroneous or if the district court applied an incorrect legal standard in reaching its decision. *LaSalle, supra,* 437 U.S. at 319, n.21, 98 S.Ct. at 2368, n.21; *United States* v. *Zack,* 521 F.2d 1366, 1369 (9th Cir. 1975).

II. Pre-Hearing Discovery

Weinstein may have failed in his burden of proof because the district court denied his request for pre-hearing discovery. We recognize the anomaly of placing a burden of proof upon the taxpayer and then denying access to what may be the very information needed to meet that burden. *See United States* v. *Serubo,* 604 F.2d 807, 812 (3.d Cir. 1979). Should we determine that discovery was improperly denied in this case, a proper remedy would be to remand for discovery and an evidentiary hearing at which Weinstein could present the fruits of that discovery.

In *Church of Scientology*, we held that the district court has great discretion to restrict or deny discovery. *See also United States* v. *Southern Tanks, Inc.*, 619 F.2d 54 (10th Cir. 1980); and *United States* v. *Ladd*, 471 F.Supp. 1150 (N.D. Tex. 1979). Discovery in a summary enforcement proceeding is the exception rather than the rule. *Church of scientology, supra*, at 824.

The Supreme Court in *LaSalle* did not address the taxpayer's right to discovery. Nevertheless, the Third Circuit has interpreted *LaSalle* to suggest guidelines for discovery. *E.g., United States* v. *Serubo*, 604 F.2d 807, 812-13 (3d Cir. 1979); *United States* v. *Genser (Genser II)*, 595 F.2d 146, 152 (3d Cir. 1979), *later appeal*, 602 F.2d 69 (3d Cir.), *cert. denied*, 444 U.S. 928, 100 S.Ct. 269, 62 L.Ed.2d 185 (1979). At a minimum, the taxpayer is entitled to discover the identities of the investigating agents, the date the investigation began, the dates of all summonses issued, and the nature of any contacts between the investigating agents and the Department of Justice. *Genser II, supra* at 152. Further discovery, carefully tailored to meet the purpose of the inquiry, may be permitted at the court's discretion. *Id.*

Some courts routinely allow limited pre-hearing discovery in enforcement proceedings. *E.g., United States* v. *Garden State National Bank*, 607 F.2d 61 (3d Cir. 1979); *Genser II, supra* at 152. Other courts allow limited discovery only if the taxpayer can make a substantial preliminary showing of abuse or wrongdoing. *E.g., United States* v. *Southern Tanks, Inc.*, 619 F.2d 54 (10th Cir. 1980); *United States* v. *Chase Manhattan Bank*, 598 F.2d 321 (2d Cir. 1979); *United States* v. *Marine Midland Bank of New York*, 585 F.2d 36 (2d Cir. 1979). This circuit has adopted the latter procedure. *Church of Scientology, supra.* Pre-hearing discovery is not generally mandated. If taxpayer's allegations are sufficient, a limited evidentiary hearing is conducted. Discovery is then warranted if the trial court is not convinced that the summonses were issued for a proper purpose. *See also United States* v. *Salter*, 432 F.2d 697 (1st

Cir. 1970) and *United States* v. *McCarthy*, 514 F.2d 368 (3d Cir. 1975). Therefore the district court did not abuse its discretion in denying Weinstein's request for prehearing discovery.

III. The Evidentiary Hearing

Weinstein was able to make a sufficient showing to persuade the district court to conduct a limited evidentiary hearing. The purpose of the evidentiary hearing is to sift out those rare cases where an improper purpose can be substantiated to determine if the taxpayer should be permitted discovery. *United States* v. *Sherman*, 627 F.2d 189, 192 (9th Cir. 1980).

The government bears an initial burden of showing at the evidentiary hearing that the summonses were issued for a proper civil purpose. *E.g., United States* v. *Powell*, U.S. 48, 57-58, 85 S.Ct. 248, 254-255, 13 L.Ed.2d 112 (1964); *United States* v. *Garden State National Bank*, 607 F.2d 61, 71 (3d Cir. 1979). In this case the government was able to make that *prima facie* showing. The burden then shifted to the taxpayer to offer proof to rebut the government's case. We must determine what the taxpayer must prove.

This circuit addressed this issue in *United States* v. *Church of Scientology*, 520 F.2d 818 (9th Cir. 1975). In that case, we determined that a taxpayer had been improperly denied an evidentiary hearing. The case was remanded and the trial court ordered to conduct a "limited evidentiary hearing to determine whether further inquiry into the Service's purposes by way of discovery [was] warranted". *Id.* at 825. The scope of the hearing was left to the discretion of the district court although it was conceived to include at least cross-examination of the summoning agents.

In *United States* v. *Zack*, 521 F.2d 1366 (9th Cir. 1975), this circuit decided that a taxpayer seeking to defeat enforcement must show that the summonses were not issued for any legitimate purpose. We recognized that this burden, as a practical matter, was quite hard to sustain. *Id.* at 1368. Even

the co-existence of an improper purpose would not prevent enforcement of the summons if the existence of a legitimate purpose was not rebutted by the taxpayer.[4]

Since our decisions in *Church of Scientology* and *Zack*, the Supreme Court decided *United States* v. *LaSalle National Bank*, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1978). *LaSalle* reaffirmed two important limitations on the enforceability of IRS summonses. First, the summonses must be issued before the IRS recommends to the Department of Justice that a criminal prosecution be undertaken. Second, prior to such a recommendation, the IRS "at all times must use the summons authority in good-faith pursuit of the congressionally authorized purposes of § 7602." *LaSalle*, 437 U.S. at 318, 98 S.Ct. at 2368.

This second prerequisite requires the IRS to maintain two standards. First, "the Service must [not] abandon in an institutional sense . . . the pursuit of civil tax determination or collection." 437 U.S. at 318, 98 S.Ct. at 2368. This standard focuses on the institutional posture of the Service instead of on the motivation of individual agents.

Second, the IRS must meet the standards of good faith enunciated in *United States* v. *Powell*, 379 U.S. 48, 57-58, 85 S.Ct. 248, 254-255, 13 L.Ed.2d 112 (1964). *LaSalle* specified that the IRS violates the *Powell* good faith standard if it is shown that the IRS became "an information-gathering agency for other departments, including the Department of Justice. . . ." 437 U.S. at 317, 98 S.Ct. 2368. *See also United States* v. *First National Bank of Atlanta*, 628 F.2d 871, 874 (5th Cir. 1980).

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[4] The existence of a general civil purpose for the tax investigation as a whole does not end a judicial inquiry. *United States* v. *Genser (Genser II)*, 595 F.2d 146 (3d Cir. 1979). If such a finding were dispositive, the taxpayer would face the impossible burden of disproving what has already been postulated by *LaSalle*, the congruency of criminal and civil liability. *Genser II*, *supra* at 150-51. A district court may, if it chooses, examine each summons. If any one summons was issued solely for an improper purpose, it will not be enforced "even in the face of an overwhelming civil purpose for the investigation as a whole." *Id.* at 150. *Cf. United States* v. *Omohundro*, 619 F.2d 51 (10th Cir. 1980) (evidence that summonses were issued for proper purpose was sufficient to warrant enforcement even though IRS admitted that the information may be used in a criminal context).

Weinstein sought to show an "extraordinary set of facts and circumstances" that would demonstrate that the IRS institutionally did not have a valid civil tax collection purpose and that the IRS was acting as an information gathering agency for the Department of Justice. Weinstein argues that he was denied an opportunity to meet his burden of proof by the trial judge's premature termination of the evidentiary hearing.

Our review of the transcript of the evidentiary hearing satisfies us that the trial court's decision to limit the evidentiary hearing was not an abuse of discretion. There was ample testimony from the two summonsing agents that the procedures followed in the investigation were not unusual and were directed toward determining Weinstein's tax liabilities. The good faith of the IRS was irrebuttably demonstrated by Agent Utaski's testimony that he found no record of the filing of Weinstein's 1975 and 1976 tax returns. Although there was some communication between the IRS and the DEA, the information given to the DEA was pursuant to a proper court order. Both agents testified that DEA did not instruct them to issue summonses or gather information. Even if Weinstein was able to show an improper purpose, it would not be enough to conclude that the IRS had "become an information-gathering agency for . . . the Department of Justice." *LaSalle, supra* 437 U.S. at 317, 98 S.Ct. at 2368.

Weinstein argues that the trial court incorrectly viewed the motivation of the agents as determinative of the good faith of the IRS. We disagree. There is no indication that the trial court examined only the motivation of the agents in reaching its conclusion.[5] There was sufficient evidence in the testimony of the agents for the trial court to conclude that the IRS had followed its procedures, and that the IRS as an institution was properly pursuing civil tax collection.

[5] The agents' motive may be relevant, however, when harassment is alleged. *E.g., United States* v. *Cortese*, 614 F.2d 914, 921, n.11 (3d Cir. 1980). Harassment was alleged in this case. We are satisfied, however, with the government's explanation that multiple summonses were issued to correct defects in the original summonses.

IV. Enforcement of the Summonses

We must now determine if there exists a sufficient basis for the trial court's conclusion that the summonses were issued for a proper purpose. Our review is limited to determining if the trial court's decision was clearly erroneous. *United States* v. *Goldman*, 637 F.2d 664 (9th Cir. 1980).

We hold that the trial court's decision to enforce the summonses was not clearly erroneous. There was sufficient evidence to support a finding that a valid civil purpose existed for the issuance of the summons.

CONCLUSION

The district court did not abuse its discretion by denying discovery or by limiting the scope of the evidentiary hearing. The trial court did not misapply the directives of the Supreme Court in *LaSalle*. Although the hearing was limited to the examination of the summonsing agents, the trial judge determined that the IRS issued the summonses in pursuit of a legitimate purpose. The decision to enforce the summonses was not clearly erroneous.

The judgment of the district court is affirmed.

MERRILL, Circuit Judge, concurring:

I concur in Judge Skopil's opinion, and agree that taxpayer has not met his burden of showing such a likelihood of bad faith on the part of IRS as would warrant the granting of discovery and further hearing.

I would add that where, as here, preliminary investigation suggested that the taxpayer, known to be engaged in income producing professional activity, had for two years failed to file income tax returns, the IRS, under any rational view of its function, was obligated to inquire further as to taxpayer's liability. A recognition by the revenue agents of this institutional obligation could hardly be other than in good faith. Here, Agent Utaski testified that he had checked with the Fresno Service Center of the IRS to ascertain whether taxpayer had filed returns for 1975 and 1976, and had been told that

there was no record of such filing. Further, he had been told by Agent Gibson in San Rafael that Gibson had no record of any returns for 1975 and 1976 having been filed by taxpayer. This may be hearsay as to the fact of filing, but it is competent evidence of Utaski's good-faith belief that no returns had been filed for those years.[1]

As to the institutional good faith of the IRS, I would note that when taxpayer is under investigation for trafficking in drugs, the prospect of guilt carries with it the prospect of unreported income. The IRS, for its own purposes, has as much interest in the question of taxpayer's drug connections as has the DEA, and as much occasion to wish to check his financial records. It cannot be said that once a taxpayer is under investigation by the DEA, the pursuit of information by IRS suggests bad faith.[2] Nor does it suggest bad faith to me for IRS to indicate its willingness to share its information with DEA, or to respond to a court disclosure order. Such sharing of information under the circumstances that exist here is perfectly proper and does not constitute IRS an information gatherer for DEA rather than for itself. The statutory provision for disclosure compelling such sharing when ordered by a court makes this clear.

WYATT, District Judge (dissenting):

I am not able to agree with the decision to affirm the order of enforcement of the IRS summonses. I therefore respectfully dissent from that decision. The procedure followed in the

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[1] I do not draw the same conclusion as does Judge Wyatt in his dissent that possession of copies of tax returns for 1975 and 1976 supplied by taxpayer's attorney and purportedly filed in San Rafael should have dispelled all questions and doubts that normally arise from a taxpayer's failure to file. In the first place, I do not find in the record any evidence or government concession that the original returns for those years ever had turned up in IRS files. Further, it should in any event be noted that there is no claim that these returns were filed until after demand for them had been made and the suspicions, which failure to file understandably create, had already arisen.

[2] A different rule applies in cases such as *United States* v. *LaSalle National Bank*, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1978), and *Donaldson* v. *United States*, 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971), where the IRS has requested the Department of Justice to proceed criminally in a *tax* matter. Where the criminal investigation is for a nontax crime, however, I find no authority that precludes the two investigations from proceeding contemporaneously, or proscribes a sharing of the information pursuant to a court disclosure order.

District Court was in my opinion wrong and was contrary to the controlling guidance in *United States* v. *Church of Scientology, etc.*, 520 F.2d 818 (9th Cir. 1975); the procedural errors of the District Court—particularly the refusal to permit appellant Weinstein to present evidence—denied appellant elementary due process and violated his constitutional rights. As a result of the procedural errors below no factual record was made sufficient to enable either the District Court or this Court to determine whether the summonses should be enforced or not. Accordingly, I would reverse the order appealed from and would remand with instructions to grant appropriate discovery to appellant, to afford appellant an opportunity to present evidence at an adequate adversary hearing, and to determine on a more complete record whether the summonses should be enforced.

Not only was the action of the Court below procedurally wrong; that action also violated substantive law principles repeatedly declared by the Supreme Court.

1.

Since the record before us is deficient as indicated, it is not possible to recite the facts with complete confidence. Based on what we have, including offers of proof, representations of counsel in briefs, and the transcript of the September 21, 1979, hearing before the District Court, the chronological development appears to have been as follows:

Appellant Weinstein is an attorney, apparently specializing in tax matters. He lived in and practiced law in Mill Valley, a town in Marin County, California.

So far as appears, Weinstein filed his own tax returns regularly through the year 1973.

Weinstein did not *timely* file tax returns for 1974, 1975, and 1976.

Sometime "in early 1977" he received by mail "delinquency notices" from the Fresno Service Center of IRS as to his 1974, 1975, and 1976 returns (T 84; "T" references are to pages of the transcript of the September 21, 1979 hearing). According to him, "shortly thereafter . . . in March of 1977" he was

called on the telephone by Agent Norton Gibson of the San Rafael District Office about the same missing returns (T 85). It seems natural that IRS should deal with Weinstein through its San Rafael office. Weinstein was in Mill Valley in Marin County, close to San Rafael, also in Marin County. Both towns are only a few miles north of San Francisco.

According to Weinstein (T 85), he explained to Agent Gibson that he had been prevented from filing the returns because he was involved in "massive litigation" but that he had "tentatively computed" the results for the years in question and that no tax was due; Gibson accepted this explanation and told him that when the returns were filed, they should be filed with him (Gibson).

In the record is a copy of a letter from Weinstein to Agent Gibson showing that Weinstein, under date of April 29, 1977, did send to Agent Gibson the original of his tax return for 1974; how the 1974 return was sent does not appear.

In the record is a copy of a letter from Weinstein to Agent Gibson showing that Weinstein, under date of June 14, 1977, did send to Agent Gibson the originals of his tax returns for 1975 and 1976. According to the returns no tax was payable.

After the 1974, 1975, and 1976 returns were sent to Agent Gibson in San Rafael, Weinstein heard nothing more about them from Agent Gibson, or from anybody else in IRS, and could have reasonably assumed that they had been duly filed with and received by IRS.

There seems to be nothing unusual or irregular in Weinstein filing his 1974, 1975, and 1976 returns in the San Rafael local office of IRS. It was Agent Gibson of that office who telephoned him about those returns and who asked that they be filed with him in San Rafael.

There was an IRS Service Center serving Northern California internal revenue districts; this was the Fresno Service Center. Fresno is some 170 miles southeast of San Francisco, and farther than that from Marin County. The Internal Revenue Code (26 U.S.C. § 6091(b)(1)(A)) provides that individual returns shall be made to the Secretary in the internal

revenue district where the individual has his legal residence or at the service center, as the Secretary by regulations may designate. It does not appear where the regulations designate that individual returns for the relevant years be filed, except that some returns (hand-carried) were directed to be filed "with any person assigned the administrative supervision of an area, zone or *local office* . . . within the internal revenue district" 26 C.F.C. 1.6091-2(d)(1); (emphasis supplied). In any event, it is difficult to fault a taxpayer who files his returns where requested or directed by the Internal Revenue Agent to whom his matter had been assigned within IRS itself.

2.

Weinstein was arrested by DEA officers on August 1, 1978, and four others were arrested on the same date. Their involvement is said to have been with 500 pounds of hashish. Where, at what time, and in what order they were arrested, does not appear. The government tells us (Brief, p. 2): "The Drug Enforcement Administration (DEA) agents making the arrests seized $12,690 in currency and savings account pass-books and receipts for deposits in excess of $80,000, all relating to accounts owned by the taxpayer." According to appellant (Reply Brief, p. 11), the currency seized was not taken from him but from Martinez, another of those arrested; Martinez was not arrested with Weinstein and was not known to Weinstein; and it was the currency seized from Martinez which was later suppressed as evidence by the District Court (Orrick, J.) as seized in violation of constitutional rights of Martinez. At least some of the bank deposit records were seized from an automobile of Weinstein but his counsel tells us (Reply Brief, p. 11) that he explained at the time that the bank records were trust accounts for clients and also explained the sources of the deposit funds. No drugs were seized from Weinstein.

DEA notified IRS of the arrests immediately and must have asked for the cooperation of IRS at least as far as Weinstein was concerned. It would seem that DEA went to IRS in order to secure help from IRS in the criminal drug prosecution of Weinstein and the others. IRS was ready and

willing to give such help and Revenue Agent Caramucci was assigned at once; he and two other IRS agents interviewed Weinstein on the day of his arrest.

In the interview on the day of his arrest (August 1, 1978), Weinstein told the IRS agents that he had filed returns late for the years 1974, 1975 and 1976; that he had filed those returns with Revenue Agent Gibson at San Rafael by request of Agent Gibson to whom the case had been assigned; that he was working on his return for 1977; that there were difficulties in securing necessary partnership papers for this return; and that no tax was shown as due on the 1975 and 1976 returns as filed with Agent Gibson.

There is confusion in the papers before us as to the extent to which the year 1974 was involved in the IRS investigation of Weinstein. The District Court did nothing to clear up this confusion. It is at least a plausible explanation that the IRS was anxious to extend its help to the non-tax criminal prosecution of Weinstein on drug charges; that an easy excuse for an IRS criminal investigation was a claim of failure by Weinstein to file income tax returns for 1974, 1975, and 1976; that only a cursory and superficial attempt was made to verify Weinstein's statement that he had filed those returns with Agent Gibson at San Rafael as directed by Agent Gibson; and that initiation of an IRS criminal investigation could be based on asserted false statements by Weinstein that he had filed 1974, 1975, and 1976 returns. When very soon, as will appear, the 1974 original return was located in the IRS records—thus confirming the truth of what Weinstein had said—the year 1974 had to be dropped as an excuse and attention focused only on 1975 and 1976. In the beginning, however, 1974 was one of the years covered by the IRS investigation.

From papers submitted to this Court on a motion for a stay pending this appeal, we learn that on August 1, 1978—the day of his arrest on the drug charges—Weinstein also told the IRS agents of his deposit in a bank of a $5,000 retainer check; and that on August 4, 1978—three days later—DEA agents served a summons on that bank for a copy of the described retainer check. This would suggest that IRS was from the outset telling

the drug criminal prosecution team in DEA and the United States Attorney's office everything IRS was learning from and about Weinstein. While it is denied for DEA that the $5,000 check information came from IRS, other circumstances cast doubt on the denial and, in any event, further exploration by the Court below of the facts was clearly called for.

On August 8, 1978, Revenue Agent Caramucci made a report asking that the Weinstein matter be referred to the Criminal Investigation Division of IRS. The excuse for this seems to have been that no record of the filing of returns by Weinstein for 1974, 1975 and 1976 could be found at the Fresno Service Center and that it might be an instance of a willful failure to file. No effort seems to have been made by IRS to inquire of Agent Gibson what he had done with the returns said to have been filed with him. Indeed, at no time to date has IRS produced any statement, declaration, or affidavit from Agent Gibson and Weinstein was not allowed to obtain his testimony below.

On August 16, 1978, a grand jury returned an indictment on drug charges against Weinstein and four others arrested on the same charges. The file number is CR-78-372-WHO and the indictment was assigned to Judge Orrick. Assistant United States Attorney Mueller was in charge of the prosecution.

On August 18, 1978, Weinstein pleaded not guilty to the indictment.

In early October 1978—in any event before October 4—the Criminal Investigation Division of IRS was considering whether to accept the referral of the Weinstein matter and Special Agent Utaski was assigned to it. His formal written assignment was dated October 18, 1979, but he had been working on the assignment long before that date.

Within the Criminal Investigation Division of IRS, Special Agent Utaski with his supervisors quickly decided to accept the referral and to begin a "failure to file" returns investigation (T 55). The basis for commencing such an investigation seems very sketchy.

Accordingly to Agent Utaski's direct testimony, in deciding whether to begin a criminal investigation of Weinstein, he "examined the microfilm research" and "could find no record of Mr. Weinstein filing income tax returns for the years 1975, 1976, and 1977" (T 53). He was not asked by the government about the 1974 return and said nothing about it. From cross-examination, it appeared, however, that the 1974 return was in the beginning readily located: "It was filed and we located it. I requested the original return and we received it" (T 66). Thus, although the 1974 return was established as having been filed with Agent Gibson at San Rafael, it moved through proper channels in IRS and was readily found.

With this state of affairs, the 1974 return as filed in the San Rafael office of IRS being actually in the hands of Agent Utaski, it would be supposed that IRS would have immediately begun an intensive inquiry of the San Rafael office and its files to see what happened about the 1975 and 1976 returns, filed in exactly the same way (according to Weinstein) as the 1974 return. However, no such inquiry was then made nor is there before us any denial by Agent Gibson that he received the 1975 and 1976 returns. Instead of an inquiry within IRS, the Criminal Investigation Division—without any basis, other than unspecified "microfilm research," for believing that Weinstein's explanation for his filing the 1975 and 1976 returns was false—launched a "failure to file" criminal investigation and, incredible as it may seem, included 1974 amongst the returns, the failure to file which was to be investigated (T 54, 57, 72, 76, 80).

The assistance of IRS in the drug prosecution, begun on the day of the drug arrests, then continued and increased. Utaski followed the drug prosecution through telephone contact established with Mueller, discussing with him the then pending indictment, its status and its future. Utaski also exchanged information with Agent Wallace of DEA and talked with him (as well as with Mueller) about the informants in the drug prosecution. According to Utaski, Mueller "wanted the results of our [IRS] investigation, what we had in our files" (T 65). In order to make it appear proper to turn over the tax investigation results to the drug prosecution team, Utaski

advised Mueller how to secure a "disclosure order" after they had "talked in terms of a possible disclosure of IRS information to the United States Attorney's Office" (T 60). The "disclosure order" to which the quoted testimony refers is apparently that provided for as to "return or taxpayer return information" by 26 U.S.C. § 6103(i). Application for such an order is said to have been first made (presumably by the United States Attorney's office) sometime in November 1978 (T 60).

It might turn out, after an adequate hearing in the Court below, that there is an explanation for all this. With the mistaken procedure followed thus far, no such explanation is in the record and the conduct of IRS seems to have been designed, primarily at least, to serve the purposes of the drug prosecution.

As apparently required by IRS procedure, Utaski began his criminal investigation on October 4, 1978, by telephoning Weinstein and telling him that "there was no record of his filing returns" (T 55). Although Utaski denied (T 55) that he secured any "cooperation" from Weinstein, the denial seems patently false from Utaski's own testimony. Weinstein made an appointment to meet Utaski (apparently to be on October 17), agreed to bring "certain records" (T 55), and told Utaski about his filing of the 1975 and 1976 returns (T 55); he undertook to bring copies of his 1975 and 1976 returns to the meeting.

Weinstein filed in November 1978 his return for 1977 and the original (apparently) reached the hands of Utaski (T 67); how the filing was made—whether in San Rafael or otherwise—does not appear. Utaski testified (T 67) that as to the 1975 and 1976 returns he could not say that they were not filed, only that he could find no record of their having been filed. It appears now to be conceded that the 1975 and 1976 returns were in fact filed, exactly as Weinstein claimed. The investigation by IRS was not sought to be justified by the Special Agents in the Court below as based on reasonable belief that there was a failure to file; they said they were trying to determine if the returns as filed were correct.

Sometime before October 17, 1978, James MacInnis became attorney, or one of the attorneys, for Weinstein (T 81, 83) and notified Utaski that the meeting with Weinstein for October 17 could not take place at that time (T 83).

On October 30, 1978, Judge Orrick filed an order granting a motion by one or more defendants (not including Weinstein) to suppress as evidence the currency and possibly other items the government intended to use at trial.

The trial of Weinstein and the other defendants on the indictment was set for November 6, 1978. We are told (Reply Brief for Appellant, p. 7) that this was the latest date for commencement of trial under the Speedy Trial Act (18 U.S.C. § 3161).

There was an indictment pre-trial conference on November 2, 1978. The government asked for a continuance of the trial in order to appeal the suppression order. As later explained by Judge Orrick (memorandum opinion quoted in Reply Brief for Appellant, p. 4);

> Weinstein objected because he had not been a party to the suppression motions in question, and the evidence that had been suppressed did not pertain to him. He urged the government to sever his case and to proceed to trial or to dismiss with prejudice the charges against him.

On November 6, 1978, the indictment was taken off the trial calendar.

The government then did, on November 14, 1978, dismiss the indictment as against Weinstein and another defendant (Munn), undoubtedly under Fed.R. Crim.P. 48(a). As Judge Orrick has stated it (quoted in Reply Brief for Appellant, p. 4);

> On November 14, 1978, the government, upon leave of court, dismissed without prejudice the indictment as to Weinstein and Gordon B. Munn, another defendant who was not directly affected by the suppression order.

It seems to be an accepted fact that the government dismissed as to Weinstein because the government did not have sufficient evidence against him. Special Agent Utaski testified that in November, 1978, Assistant United States Attorney Mueller told him that the dismissal against Weinstein was because the government "just didn't have enough evidence to take to a jury right now" (T 59).

The government did not in fact prosecute any appeal from the suppression of evidence order made by Judge Orrick. What happened to the drug indictment in the District Court as against the three defendants other than Weinstein and Munn cannot be established from the record before us. It appears that counsel for Weinstein told the Court that the United States Attorney had asked for a "disclosure order" in January, 1979, "after he had dismissed the remaining defendants in the drug case" (T 5). The Reply Brief for Appellant (p. 7) states that the "disclosure order" was obtained by the United States Attorney "only after he had dismissed the *entire* indictment" (emphasis supplied). This suggests strongly that at some time between November 14, 1978, and January 11, 1979, the government dismissed the drug indictment as against the remaining three defendants, presumably under Fed.R. Crim.P 48(a) by leave of Court. While the government's brief does not state that the drug indictment is still pending as to any defendant, it does state that (p. 3): "Indictments against other defendants remained and the appeal [from Judge Orrick's suppression order] was not mooted." This suggests that as to some defendants the federal drug indictment is still pending. In any event, whatever the status of that indictment, the United States Attorney's Office continued to use IRS in an attempt to supply the deficiencies in its criminal case against Weinstein.

On January 11, 1979, an ex parte order was made and filed by the District Court (not by Judge Orrick) authorizing IRS to disclose to the United States Attorney the results of the IRS investigation. Apparently the order (which could properly be made ex parte) was "quite explicit... describing the drug investigation, how the materials which [IRS] would develop would be very important in the drug prosecution ..." (T 46).

On January 25, 1979, Mr. MacInnis, counsel to Weinstein, met with Utaski and Reynolds (another Special Agent). Presumably Weinstein was present also but the record does not show, one way or the other. As this meeting, MacInnis gave to the IRS Special Agents copies of the 1975 and 1976 tax returns of Weinstein which had been filed with IRS Agent Gibson in San Rafael, at the request of Gibson.

At about this time, IRS decided to transfer Utaski to Cincinnati and to substitute Jackson for him in the Weinstein matter.

On February 27, 1979, Special Agent Jackson turned over to Assistant United States Attorney Mueller everything IRS had on Weinstein which had not already been given to the prosecutors. The material included daily worksheets, reports of interviews, and the like. According to the testimony of Special Agent Jackson, the IRS, on February 27, 1979, made available to the United States Attorney's Office, among other things, the original 1974 return "filed by Mr. Weinstein, photocopies of the 1974, 1975 and 1976 tax returns . . . furnished by Mr. MacInnis and the original 1977 tax return filed by Mr. Weinstein (T 22). This is an explicit recognition that before any question of summonses or their enforcement arose, the IRS knew that Weinstein had filed all his tax returns just as he said he had.

3.

The seven IRS summonses which are the subject of this appeal were issued between December 15, 1978, and January 31, 1979. Six were issued by Utaski and the seventh by Jackson, another Special Agent, at the request of Utaski. Such summonses are authorized by 26 U.S.C. § 7602.

At all times in and since November, 1978, and, of course, when the summonses were issued, both Utaski and Jackson knew that the United States Attorney's Office was applying for, or intended to apply for, an order authorizing IRS to turn over to the United States Attorney the results of the IRS investigation for use in a pending non-tax criminal investigation or prosecution.

Since October, 1978, the agents issuing the summonses had had in their possession the original of the 1974 return as filed in San Rafael by Weinstein; since November, 1978, they had had in their possession the original of the 1977 return filed by him; and since at least January 25, 1979, they had had in their possession copies of the 1975 and 1976 returns as filed by him in San Rafael. Three of the summonses involved on this appeal

were issued after January 25, 1979. In the face of this showing, it is not possible for me to accept the conclusion that the good faith of the IRS was demonstrated simply because Utaski testified (without counsel for Weinstein being allowed adequate cross-examination) that he could find no record of the filing by Weinstein of returns for 1975 and 1976. If he could not find such a record, it was not because of any omission by Weinstein but was because of errors of Agent Gibson and others in IRS.

Notices of the issuance of the summonses were given to Weinstein. 26 U.S.C. § 7609(a)(1).

Each summons refers twice to the fact that it is from the "Criminal Investigation Division." While this is accurate, the reason for its use and emphasis is not made to appear.

Weinstein gave notices to the person and to the banks summoned that they should not comply with the summonses. This he was entitled to do. 26 U.S.C. § 7609(b)(2). They did not comply.

4.

On April 24, 1979, the government and Special Agent Jackson filed a verified petition in the District Court to commence a proceeding to enforce the summonses described above. 26 U.S.C. §§ 7402(b), 7604(b). The proceeding was assigned to Judge Conti. To what extent the United States Attorney's Office participated in the decision to commence the enforcement proceeding cannot be determined from the inadequate record made in the District Court.

On June 21, 1979, an order was filed granting an application by Weinstein to intervene in the proceeding. He had a statutory right to intervene. 26 U.S.C. § 7609(b)(1).

On June 26, 1979, Weinstein filed an answer containing defenses which asserted bad faith on the part of IRS in issuing the summonses and which asked for "limited discovery" and "an evidentiary hearing . . . under due process of law in order to meet *his* burden of proof upon his . . . defenses . . . to enforcement of the . . . summons" (emphasis supplied). The principal

defense asserted by Weinstein was that the summonses were issued by IRS "for the improper purpose of collecting information and evidence by civil IRS administrative process for use by [the] Department of Justice in a pending criminal case and/or continuing investigation of the intervenor Weinstein. . . ."

On July 3 and 17, 1979, counsel for Weinstein filed declarations in opposition to the enforcement petition.

On August 7, 1979, an order was filed by Judge Conti requiring that cause be shown on September 7, 1979, why the summonses should not be enforced.

On August 31, 1979, the government filed five declarations in support of the enforcement petition. These were from DEA Agent Wallace, IRS Special Agents Utaski and Jackson, IRS Agent Caramucci, and Assistant United States Attorney Mueller. The failure of the government to submit anything from Agent Gibson at San Rafael is highly significant when it is considered that the government's explanation of the IRS investigation is that Weinstein had failed to file tax returns. Even on this appeal, the government persists in this explanation (Brief, pp. 9, 12), which has been thoroughly discredited and has been long ago abandoned by the Special Agents of IRS who are actually making the investigation.

While the September 7, 1979, hearing was ordered to afford respondents and intervenor Weinstein an opportunity to contest enforcement of the IRS summons, it seems that on September 6, 1979, Weinstein filed a separate application for an evidentiary hearing on the issues and for an "order allowing pre-hearing discovery" (Docket Entries Nos. 31 and 32).

5.

Before continuing with the chronological development of events, a proper understanding of this appeal may be advanced if the chronology is interrupted to notice basic substantive principles governing enforcement of IRS summonses and to notice the procedures which should be followed in determining whether to enforce them. Substantive principles will first be considered.

The governing principles here applicable is that an IRS summons will not be enforced where "the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution . . . ." *Reisman* v. *Caplin*, 375 U.S. 440, 449, 84 S.Ct. 508, 513, 11 L.Ed.2d 459 (1964).

If a criminal prosecution or criminal investigation by the prosecuting arm of the government is already pending, then any use of IRS summonses to secure information for the purpose of the criminal prosecution or investigation is in bad faith even if a civil tax purpose is also present. If there is no pending criminal prosecution or investigation by the prosecuting arm of the government, then IRS summonses may be enforced, even though *solely* for the purpose of investigating whether criminal conduct has occurred *provided* IRS has not already recommended prosecution to the Department of Justice. This follows from the statement by the Supreme Court that the principle quoted above from *Reisman* v. *Caplin* was "applicable to the situation of a pending criminal charge, or, at most, of an investigation solely for criminal purposes." *Donaldson* v. *United States,* 400 U.S. 517, 533, 91 S.Ct. 534, 543, 27 L.Ed.2d 580 (1971). In the same opinion it was also stated (400 U.S. at 536, 91 S.Ct. at 545):

> We hold that under § 7602 an internal revenue summons may be issued in aid of [a criminal] investigation if it is issued in good faith and prior to recommendation for criminal prosecution.

The reason for the principles just summarized has been explained by the Supreme Court in its most recent opinion on the subject. If a criminal charge is pending, to use an IRS summons to secure information in aid of the prosecution would improperly extend the scope of discovery provided by the Federal Rules of Criminal Procedure. If the prosecuting arm is making an investigation into possible criminal conduct, to use an IRS summons to secure information in aid of the investigation would improperly trespass on the traditional functions of the grand jury. And where no criminal charge is pending nor any criminal investigation by the prosecuting arm, to deny enforcement of IRS summonses after a recommendation of prosecution by IRS is a "prophylactic" to protect the public policy as just set out. This was the explanation in *United States* v. *LaSalle National Bank,* 437 U.S. 298, 312-313, 98 S.Ct. 2357, 2365, 57 L.Ed.2d 221 (1978):

> Nothing in § 7602 or its legislative history suggests that Congress intended the summons authority to broaden the Justice Department's right of criminal litigation discovery or to infringe on the role of the grand jury as a principal tool of criminal accusation .... The likelihood that discovery would be broadened or the role of the grand jury infringed is substantial if post-referral use of the summons authority were permitted .... Effective use of information to determine civil liability would inevitably result in criminal discovery. The prophylactic restraint on the use of the summons effectively safeguards the two policy interests while encouraging maximum interagency cooperation.

Thus, the presence of a civil tax purpose by IRS does not show "good faith" by IRS so as to warrant enforcement of an IRS administrative summons if (a) there is already pending a criminal charge or a criminal investigation by the prosecuting arm of the government *or* (b) the IRS has already recommended prosecution of a tax related criminal charge. As carefully explained by the Supreme Court in *LaSalle* 437 U.S. at 311-13, 98 S.Ct. at 2365:

> We recognize, of course, that even upon recommendation to the Justice Department, the civil and criminal elements do not separate completely. The Government does not sacrifice its interest in unpaid taxes just because a criminal prosecution begins. Logically, then, the IRS could use its summons authority under § 7602 to uncover information about the tax liability created by a fraud regardless of the status of the criminal case. But the rule forbidding such is a prophylactic intended to safeguard ... policy interests.

LaSalle dealt with an investigation by IRS of a tax related offense before any criminal charge was pending and before any criminal investigation by the prosecuting arm of the government. The "policy interests" are far stronger in the case at bar and the situation here is far clearer for denial of enforcement of the IRS summonses because (a) a criminal charge and a

criminal investigation by the prosecuting arm of the government—the United States Attorney's Office—were already pending before the summonses here were issued; (b) the criminal charge and investigation dealt with an offense (narcotics) not directly related to taxes; and (c) it was the prosecuting arm of the government which brought in the IRS.

6.

Where, as here, the taxpayer has asked for discovery and has also asked for an evidentiary hearing, the procedure to be followed in respect of discovery in the summons enforcement proceeding has been pointed out by this Court in *United States* v. *Church of Scientology, etc.* 520 F.2d 818 (1975).

Weinstein has a right to contest the IRS summonses on the ground that "the material is sought" for an "improper purpose" (375 U.S. at 449, 84 S.Ct. at 513). It would be an "improper purpose" if—as seems to be beyond dispute—IRS proposes to make the information available to the United States Attorney's Office. This was made crystal clear in *LaSalle* when the Supreme Court declared (437 U.S. at 317, 98 S.Ct. at 2368): "... the good-faith standard will not permit the IRS to become an information-gathering agency for other departments, including the Department of Justice, regardless of the status of criminal cases." Of course, it is no answer to say that there was a "disclosure order" here, dated January 11, 1979, under 26 U.S.C. § 6103(i); such an order necessarily relates to "return information" already in the files of IRS and does not make proper "information-gathering" in the future which would otherwise be for an "improper purpose."

Weinstein also has a right to an adversary hearing where he may present evidence to show that the summonses were issued for an "improper purpose," as to which it is recognized that Weinstein has the burden of proof. The Supreme Court has declared that in a summons enforcement proceeding the rights of a taxpayer, such as Weinstein, must be "protected" and "an adversary hearing, if requested" must be "made available" (400 U.S. at 529, 91 S.Ct. at 541).

The hearing with which the *Scientology* opinion was concerned was not, however, the "adversary hearing" to which Weinstein was entitled on the issue of "improper purpose" raised by his answer. The hearing ordered in *Scientology* was simply a "*limited* evidentiary hearing to determine whether further inquiry into the Service's purposes by way of discovery [was] warranted" (520 F.2d at 825; emphasis in original).

The discovery procedure approved in *Scientology* for summons enforcement proceedings was that discovery should be the exception; that conclusory averments of an improper purpose are not sufficient for a grant of discovery; that some evidence should be introduced by the opponent of enforcement; that this should be done at a limited evidentiary hearing where it would be appropriate for the opponent to cross-examine the agent issuing the summons; and that if, after the limited hearing, it appeared to the Court that a substantial question existed as to the validity of the IRS purpose, discovery should be granted. While not expressly articulated in this Court's opinion, it seems evident that, whether discovery be granted or not, an adversary hearing must still be afforded at which the opponent is given an opportunity to present evidence of the claimed "improper purpose" in the issuance of the summonses.

7.

We are told (Brief for Appellant, p.5) that on the return of the order to show cause on September 7, 1979, the discussion between the District Court and counsel was not about enforcement of the summonses but was about the "procedure to be followed" in the enforcement proceeding. Counsel for Weinstein insisted that he was entitled to "a complete evidentiary hearing, following completion of discovery"(Brief for Appellant, p. 6).

After the procedural conference on September 7, 1979, and on the same day, Judge Conti filed an order with memorandum opinion. This indicated that the District Judge had studied the relevant precedents, including *Scientology*, understood their principles, and accepted them. His opinion states (citing

LaSalle) that "the good faith standard does not permit the IRS to exercise its summons authority" for any purpose "to gather evidence for use in a non-tax criminal case currently pending against" Weinstein. He had read the "affidavits" (declarations) filed by the parties. He referred to the requirement "that an adversary hearing into the enforceability of an IRS summons must, if requested, be made available." He referred to *Scientology* and stated that the "affidavits" for Weinstein raised "sufficiently serious questions to merit a hearing" and he fixed a "further hearing" for September 21, 1979 at 1:30 p. m.(the time may turn out to be of some significance). The opinion stated: "The hearing will be limited to an examination of the persons who have offered affidavits in support of the petition. The Court will then determine on the basis of its observations whether further inquiry into the Service's purposes is warranted." It will be recognized that this is a partial quotation from, and a paraphrase of, page 825 of the *Scientology* opinion dealing with what that opinion there referred to as "a pre-discovery evidentiary hearing." It seems evident that Judge Conti intended the September 21 hearing to be "a pre-discovery evidentiary hearing," the "*limited* evidentiary hearing to determine whether further inquiry into the Service's purposes by way of discovery is warranted" described on page 825 of the *Scientology* opinion (emphasis in original). This is confirmed by the specific cite in Judge Conti's opinion to page 825 of *Scientology*. The September 21 hearing was to be the "limited" hearing to determine whether discovery should be granted and was not to be the "adversary hearing" to which Weinstein was entitled and at which he had a right to "challenge the summons on any appropriate ground" including that the summons was issued "for the improper purpose of obtaining evidence for use in a criminal prosecution"(375 U.S. at 449, 84 S.Ct. at 513).

If the intention of Judge Conti in his September 7 opinion was as indicated in his opinion, that intention radically changed between September 7 and September 21, 1979.

8.

There was a hearing on September 21, 1979, beginning at 1:30 p.m. The transcript suggests that there were time pressures on the District Judge, possibly because it may have been at a

luncheon recess of a busy District Court. At the very beginning, while stating appearances to the Reporter, counsel for Weinstein asked for "a moment to get unpacked." The Court replied: "Well, don't unpack too much." (T. 3). The Court later stated: "I am not going to have a big, protracted hearing." (T. 8). The Court still later addressed counsel to Weinstein: "Well, let's move on. I don't want to spend all day on this." (T. 42-43).

In any event, counsel for Weinstein told the Court (T. 3-7) that if necessary Weinstein, without any discovery, was prepared to go forward with a hearing on the merits as to whether the summonses should be enforced or not; that Weinstein would concede that the government on the papers had made a prima facie case for enforcement; and that Weinstein was prepared to present his own testimony and that of the five declarants for the government (four agents and the Assistant United States Attorney) to sustain his burden of proof of an improper purpose in the issuance of the summonses.

The Court announced (T. 7) that the purpose of the hearing was "to find out about the enforceability of the summons and to obtain enforcement of the summons." The Court declined to permit Weinstein to present any evidence, except in the cross-examination of "the agent, who issued the summons" (T.7; also see T. 8), mistakenly identified by the Court as Jackson (who in fact issued only one of the seven summonses involved). The Court directed the government to put Jackson on the stand, stating that when the examination of that agent was ended, if the Court had a substantial question about the IRS motives, there would be an adjournment of the hearing and limited discovery would be allowed, but that if "no such questions existed" then "the matter is at an end" and "there is no reason for any further hearing"(T. 8). Thus, if the government could satisfy the Court by the testimony of the agent (or agents) who issued the summonses, those summonses would be enforced without giving Weinstein any opportunity to present any evidence to show an improper purpose for issuance of the summonses (T. 7, 8). While the Court cited *Scientology* as precedent, a reading shows that *Scientology* intended no such thing.

In vain, counsel for Weinstein pointed out that Jackson came late to the scene and followed Utaski, that the evidence should be taken chronologically, that Weinstein should be allowed to present his evidence, that he would like to start with his own testimony, that Caramucci and DEA Agent Wallace should come next, and that Weinstein wanted to show how from the beginning the drug case prosecution was using IRS for improper gathering of information (T. 8-10). The Court stated that it was not interested in "the drug part" or in "what happened to Mr. Weinstein" but was solely interested in "the motivation of the IRS." The District Court mistakenly believed, as the majority here now believes, that if there was any civil tax purpose for the issuance of an IRS summons, then a separate purpose of IRS to aid a pending criminal investigation or criminal prosecution by the United States Attorney would not prevent the enforcement by the Courts of an IRS summons. Such a belief can only be held by ignoring the plain statement of the Supreme Court in *LaSalle*: "The Government does not sacrifice its interest in unpaid taxes just because a criminal prosecution begins. Logically, then, the IRS could use its summons authority under § 7602 to uncover information about the tax liability created by a fraud regardless of the status of the criminal case. But *the rule forbidding such* is a prophylactic intended to safeguard . . . policy interests" (437 U.S. at 311-12, 98 S.Ct at 2365; emphasis supplied).

By the time of the hearing on September 21, 1979, all pretense had been dropped by IRS that the issuance of the summonses was related in some way to a failure by Weinstein to file tax returns. Special Agent Jackson, the lead-off witness for the government, conceded that all of the tax returns were filed by Weinstein and attempted to justify the summonses on a wholly *different* ground—that IRS now wanted to verify the correctness of the returns admittedly filed. He described the purpose of the investigation as follows:

> . . . to determine the accuracy of those returns (T. 14);
>
> To determine if the returns, *as filed by Mr. Weinstein,* are correct. (T. 14-15; emphasis supplied).

After direct and cross-examination of Jackson, the government was permitted to call Special Agent Utaski. After his direct examination, counsel for Weinstein was permitted to cross-examine for several minutes. Then the Court interrupted to say (T.86): "... We are going way far afield. I want to know if there is any bad faith or if there is any nexus between the two. I haven't found any so far." This last observation seems to be particularly unfair since the Court had refused to permit Weinstein to present any evidence (T. 7, 8), limiting him to the cross-examination of the relatively minor IRS agent directed to be first called by the government and cutting off and refusing any meaningful cross-examination of the chief IRS agent.

Counsel for Weinstein asked to be allowed to finish his cross-examination of Utaski. This was refused (T. 86). The Court then stopped the proceedings and without further ado announced its decision (T. 86):

> I am going to cut the hearing off at this particular juncture. The purpose of the hearing is to sift out the evidence, if there is any, of harassment or improper purpose that can be substantiated to avoid dilatory or discovery matters and to see whether or not the purpose of the summons were to assist the government, and we have had both the people on the stand that have issued the summons and I find no bad faith on their part, nor any purpose to assist the government in the drug case and thereby, the court orders the government's petition for enforcement of summons is granted.

If any decision was called for so precipitously, it was a decision to deny enforcement of the summonses since it appeared beyond dispute that the IRS, whatever its interest in Weinstein's civil tax liability, was also gathering information for the United States Attorney. Certainly there was not the slightest justification for shutting off the cross-examination, denying Weinstein the right to present any evidence, and abruptly halting the hearing.

On September 24, 1979, Judge Conti filed an order enforcing the seven summonses involved. There was no opinion but there was a finding that the IRS "was not acting as

an information-gathering agency for the Department of Justice." This finding is contrary to such evidence as there was, and after Weinstein had been denied, not only discovery, but the right to present evidence. As an indication of the information-gathering relationship between IRS and the United States Attorney, counsel to Weinstein pointed out to Judge Conti (without any contradiction from the government) that, in order to secure an IRS "disclosure order" from the District Court (not Judge Conti nor Judge Orrick), the Assistant United States Attorney had represented to the District Court "that it was essential to the United States Department of Justice to have access to all of this civil tax information so-called that were to be gathered [by IRS] on Mr. Weinstein for the express purpose of using it in a continuing investigation or a present case against Mr. Weinstein" (T. 6). Even though Judge Conti cut off any adequate development of the facts, this is itself a showing that the United States Attorney's office was using IRS wrongly to broaden the discovery permitted under the Federal Rules of Criminal Procedure as to a pending indictment and was wrongly invading the traditional function of a grand jury as to a criminal investigation.

9.

Weinstein had at all times protested the dismissal without prejudice of the indictment as to him. A motion that this dismissal be with prejudice was argued to Judge Orrick on October 2, 1979.

On October 4, 1979, the IRS commenced a second proceeding to enforce 6 more of the 36 summonses issued through June 1979 in the Weinstein matter. As to this second enforcement effort, the same procedure had been followed as in the first. The second proceeding was also assigned to Judge Conti.

On October 10, 1979, a notice of appeal was filed for Weinstein from the September 24, 1979, order enforcing the summonses. At the same time there was a motion to Judge Conti for a stay pending the appeal. On October 30, 1979, Judge Conti denied the motion for a stay pending appeal.

On November 16, 1979, a motion panel of this Court (Choy and Kennedy, C. JJ.) granted a motion by Weinstein for a stay pending appeal.

Weinstein moved in the District Court for a stay of the second enforcement proceeding. Judge Conti took this motion under advisement on November 30, 1979, and so far as appears no decision has been filed.

We are told (Reply Brief for Appellant, p. 5) that on January 8, 1980, an indictment was returned in a California state court against Weinstein and others (including the other defendants indicted in the Court below on August 16, 1978) on the same drug charges as made in the federal indictment. Why the federal indictment was dropped (if it has been) and what the connection is between the federal and state indictments does not appear. The logical assumption is that the federal prosecutors worked with the state prosecutors and made available to the latter the information gathered for the federal prosecution by the IRS.

On January 11, 1980, Judge Orrick denied the motion by Weinstein that the dismissal of the federal indictment as to him be with prejudice; he announced his decision in open court. On January 18, 1980, a memorandum opinion and order were filed by Judge Orrick, embodying and explaining his decision. According to the Reply Brief for Appellant (p. 5), the opinion

> . . . acknowledges the substantiality of the due-process and speedy trial issues presented . . . rejects the government's contentions of non-justiciability, . . . specifically refers and defers to the pendency of the appeal in this case as being where any evidence of institutional bad faith vis-a-vis the IRS and the drug-case prosecutor must be adjudicated, and holds that on the record before him he finds no ground upon which to exercise his discretion to order the government's without-prejudice dismissal of the indictment converted to a with-prejudice dismissal.

Appellant moved in this Court to supplement the record on this appeal by adding the transcript of the January 11, 1980, hearing before Judge Orrick and by adding the opinion and

order of January 18, 1980 of Judge Orrick. The motion was denied by Judge Sneed by order filed February 8, 1980, but it was provided that "the items shall be lodged with the Court for such consideration as the panel which hears the case on its merits deems appropriate."

10.

It is difficult to have confidence in the presentation of this matter for the government and difficult to avoid an impression that the true state of affairs was never revealed.

There is no mention of Agent Gibson in the government's brief on this appeal nor, of course, any explanation for the failure to submit anything from him. We know that Agent Gibson duly received at San Rafael the 1974 return; the original was easily obtained in October 1978 by Utaski. We know that the 1975 and 1976 original returns were filed at San Rafael in the same way as the 1974 return. What did Gibson do with them? Where are they now? Is there in fact no IRS record of their having been filed? If not, why not? The evasions of the government and the procedure followed in the District Court prevented these questions from being answered.

There is no explanation by the government for its dismissal of the indictment against Weinstein, nor any effort to contradict the sworn testimony of Special Agent Utaski that, according to the Assistant United States Attorney in charge of the prosecution, dismissal was required because there was not enough evidence against Weinstein (T. 59). Yet, the government makes bold to tell this Court in its brief:

> Here, the Internal Revenue Service was dealing with an apparent drug dealer/attorney who had, allegedly, failed to file income tax returns for several years and lied to the first investigating agent. (p. 6)
>
> . . . the Drug Enforcement Administration . . . had apprehended the taxpayer with more than 500 pounds of hashish . . . . (p. 8)

> When Revenue Agent Caramucci determined that taxpayer, an apparent drug dealer, had made false statements to him and had failed to file income tax returns for the years 1975, 1976, and 1977, he referred the investigation as a potential fraud case. (p. 9)
>
> Failure to file returns and making false statements to agents are recognized badges of tax fraud. (p. 12)

Not only does there seem to be no justification for the emphasis on drug offenses by Weinstein but when the government's brief was filed, it had long been established—despite the restrictions in the District Court—that Weinstein had in fact filed his tax returns and that his statements to the IRS agents were true. The IRS agents, at the inadequate hearing below, had so conceded.

The conduct of the government in contending that Weinstein declined to present evidence in the District Court is also questionable.

The government represents in its brief (p. 4):

> When the District Court became satisfied that taxpayer was not able to elicit any evidence to support his claims from the agents, it asked taxpayer if he had any other evidence to present. Counsel declined to present any evidence . . . .

and again (p. 7):

> Before terminating the evidentiary hearing, the District Court asked taxpayer's counsel if he had any further evidence to present. Counsel declined to present any other evidence . . . .

It is true that the transcript of the September 21, 1979, hearing shows a question by the District Court (T. 86): "Have you got another witness so we can proceed?" From this question, and what immediately preceded and followed it, there is no way to determine to whom the question was addressed. In the context of the hearing from its commencement, however, the question must have been addressed to *government* counsel, as appellant's Reply Brief (p. 12) insists was the case. The District Court had in the beginning directed that the *government* call as witnesses the agent (or agents) who issued the

summonses (T. 7, 8). Counsel for Weinstein had asked to be allowed to present evidence first, had indicated the witnesses he proposed to call (including Weinstein himself), and the order in which he proposed to call them (T. 3-7). The District Court denied Weinstein the right to present evidence, limiting his counsel to cross-examination of the agent (or agents) directed to be called by the government, and later denying an adequate cross-examination of the more important of the two agents called by the government (T. 7, 8, 86). The Court below early ruled (T. 8):

> THE COURT: I am going to have the agent that issued the summons testify and listen to him. And if I am satisfied after that, then there is no reason for any further hearing.

Having thus early denied Weinstein the right to present any evidence, it can scarcely be supposed that the Court below would address to counsel for Weinstein a question whether other witnesses were available.

11.

The procedure followed below as to discovery was contrary to that specified in *Scientology* and contrary to the District Court's own order filed September 7, 1979. It was an abuse of discretion, in my view, to deny any discovery to appellant. The circumstances were unusual, to say the lease, and strongly suggested the necessity of a thorough exploration.

As a matter of substantive law, the District Court committed error in denying appellant his right to "challenge the summons" on the "appropriate ground" that the "material was sought for the improper purpose of obtaining evidence for use in a criminal prosecution . . . ." (375 U.S. at 449, 84 S.Ct. at 513). Not quite a year ago, in what seems to have been its latest repetition of the established principle, the Supreme Court declared that a person in the position of Weinstein "is entitled to challenge the issuance of the summons in an adversary proceeding in federal court prior to enforcement, and may assert appropriate defenses." *United States* v. *Euge*, 444 U.S. 707, 719, 100 S.Ct. 874, 882, 63 L.Ed.2d 141 (February 20, 1980).

To order enforcement of the summonses after an arbitrary denial of elementary due process, as I see it, was a grave mistake.

It seems especially unfair to justify enforcement on the ground that Weinstein failed to meet his burden of proof when he was denied in the District Court his right to present evidence.

I would reverse the order appealed from and would remand with instructions to grant appropriate discovery to appellant, to afford appellant an adequate adversary hearing, and to determine on a more complete record whether the summonses should be enforced.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
Aug 28 1981
RICHARD H. DEANE
Clerk,
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA and DONALD JACKSON, Special Agent, *Appellees,*	
v.	**No. 79-4691**
CHARLES H. STUCKEY, et al., *Respondents,*	**D.C. # 78-982**
and	**ORDER**
MORRY WEINSTEIN, *Appellant.*	

Appeal from the United States District Court for the Northern District of California Samuel Conti, Judge, Presiding

Before: MERRIL and SKOPIL, Circuit Judges, and WYATT, District Judge*

The panel has voted to deny the petition for rehearing. Judges Merrill and Skopil vote to reject the suggestion for rehearing en banc, and Judge Wyatt expresses no view.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

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* The Honorable Inzer B. Wyatt, Senior United States District Judge of the Southern District of New York, sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ORIGINAL
FILED
Sep 7 1979
Clerk, U.S. DIST. COURT
San Francisco

UNITED STATES OF AMERICA and
DONALD JACKSON, Special Agent,
Petitioners,

vs

CHARLES H. STUCKEY, et. al.,
Respondents.

No. C-79-982-SC

ORDER

This matter is before the court on the government's petition for enforcement of Internal Revenue Service summonses issued to nontaxpayer, third party recordkeepers and on the taxpayer-intervenor's application for an evidentiary hearing on and pre-hearing discovery into the question whether the summonses were issued in good faith.

To be enforceable, an IRS summons must be issued in good faith to aid in the determination and collection of taxes. *See United States* v. *LaSalle National Bank,* 437 U.S. 298, 318 (1978). The taxpayer-intervenor insists that the summonses involved in this case were issued by the IRS to gather evidence for use by the Department of Justice in a non-tax criminal case currently pending against him. Manifestly, the good faith standard does not permit the IRS to exercise its summons authority for this purpose. *See United States* v. *LaSalle National Bank, supra,* at 317.

In support of the allegation of bad faith, counsel for the taxpayer has submitted affidavits wherein he alleges, among other things, that:

(1) The IRS was drawn into an investigation of the taxpayer by the Drug Enforcement Agency after it arrested that taxpayer on a drug charge;

(2) the IRS communicated to the DEA information it obtained from the taxpayer;

(3) the Assistant United States Attorney who is handling the drug case maintained post-indictment, and pre-trial contact with IRS agents and investigators;

(4) the AUSA obtained a without prejudice dismissal of the indictment in the drug case pending compliance with the summonses sought to be enforced;

(5) the AUSA has refused to dismiss with prejudice the indictment in the drug case on the ground that the case is still under investigation;

(6) the IRS has refused on several occasions the taxpayer's offers to proceed with a cooperative civil examination of his returns;

(7) the Department of Justice has allowed the IRS access to defense evidence lodged in connection with the drug case;

(8) the United States obtained an ex parte order directing the IRS to disclose to the AUSA and others involved in the prosecution of the drug case all information developed or yet to be developed by the IRS in its investigation of the taxpayer; and

(9) the IRS has been enlisted in a continuing scheme by the United States Attorney to abuse IRS process to compel production of evidence in the drug case.

The United States has countered these allegations with affidavits of the AUSA and others who deny any improper contact between the Department of Justice and the IRS.

In *Donaldson* v. *United States,* 400 U.S. 517 (1971), the Court indicated that an adversary hearing into the enforceability of an IRS summons must, if requested, be made available. *Id.* at 528-29. In *United States* v. *Newman,* 411 F.2d 165 (5th Cir. 1971), the Fifth Circuit ruled that an evidentiary hearing is required only when there is raised in a substantial way substantial deficiencies in the summons proceedings. *Id.* at 169. The affidavits of the taxpayer's counsel raise sufficiently serious questions to merit a hearing in this case. See *United States* v. *Church of Scientology of California,* 520 F.2d 818, 825 (9th Cir. 1975). The hearing will be limited to an examination of the persons who have offered affidavits in support of the petition. The court will then determine on the basis of its observations whether further inquiry into the Service's purposes is warranted.

In accordance with the foregoing, it is hereby ordered that a further hearing shall be held on September 21, 1979, at 1:30 p.m.

Dated: September 7, 1979.

SAMUEL CONTI

United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA and DONALD JACKSON, Special Agent, *Petitioners,* vs CHARLES H. STUCKEY, et. al., *Respondents.*	**No. C-79-982-SC**

[EXCERPTS OF REPORTER'S TRANSCRIPT OF HEARING OF SEPTEMBER 21, 1979, CONTAINING DISTRICT COURT'S RULINGS; RT pages 4-12 and 85-87 IN RECORD IN COURT OF APPEALS]

* * *

THE COURT: What do you intend to do?

* * *

MR. YOUNGQUIST:

What I intend to do, Your Honor, is, through the testimony of my client, Mr. Weinstein * * * establish the origins of this criminal tax investigation [and] through the cross-examination of the government witnesses, who have filed declarations.

I intend to demonstrate, Your Honor, that number one, there was no legitimate civil purpose to the inception and continuation of this tax investigation. I intend to demonstrate that this is one of those extraordinary cases, Your Honor ***.

The nexus that I am talking about, Your Honor, [is] * * * the drug investigation, the drug indictment, the pretrial machinations of the government, the refusal of the government to take that case to trial, the steps of the Assistant United States Attorney and the assurances that he made to counsel before Judge Orrick in chambers in [that] case, steps after he dis-

missed the indictment against Mr. Weinstein, after the Speedy Trial [Act's time] had expired without any excluded time with respect to Mr. Weinstein, refusing to say that the case against Mr. Weinstein was closed, that it was open, that it was continuing.

The steps that Mr. Mueller, the Assistant U.S. Attorney took, to then go to a judge other than Judge Orrick to request a disclosure order under the provisions of the Internal Revenue Code from the general duty judge in January after he had dismissed the remaining defendants in the drug case[.] The drug case was closed at that time, or on the day that he made the application[.] He did not take it to Judge Orrick who had the case. He made allegations, which are in the record, Your Honor, attached to Mr. Mueller's Declaration, [see CR 26, Exhibits D and E to Declaration] that it was essential to the United States Department of Justice to have access to all of this civil tax information[,] so-called[,] that [was] to be gathered on Mr. Weinstein[,] for the express purpose of using it in a continuing investigation or a present case against Mr. Weinstein.

These are all extraordinary actions, Your Honor. I have never run across anything quite like this[,] and I know that Your Honor's time is limited and all this, but I do urge Your Honor to give me sufficient latitude. I do not propose to get up here with a broad sword and try to impeach and impugn agents generally or to try the drug case[,] because there is no drug case.

But certain facts must be developed, and the interconnection[s] between the investigating IRS agents and the DEA agent, who is here to testify, have got to be established[.] And I am quite confident, Your Honor, if you give me that latitude, [if] we are allowed to go ahead here and thoroughly cross-examine each of the witnesses that I have mentioned, the four or five government witnesses and Mr. Weinstein, that you will see what the truth is. That's what you really have to determine here, Your Honor.

I know that the terms of your order [of September 7th] were that you would hear limited testimony to make a determination whether we should go on with discovery, whether there should be any further hearing in this matter. I am prepared, although I am limited by not knowing what is in the government's files, I am prepared to cross-examine on what I have and I think that will demonstrate at least, Your Honor, that there is an extreme doubt on the enforceability of these particular summons[es], and the 30-odd other summons[es] that are outstanding in this case.

THE COURT: Well, the purpose of the evidentiary hearing is to find out about the enforceability of the summons[es] and to obtain enforcement of the summons[es] The IRS need show only[:] One, that it seeks to ascertain and collect tax liability; Two, that the information sought is relevant to that purpose[;] Three, that it does not already possess the information; and Four, that it has followed the prescribed administrative steps.

MR. YOUNGQUIST: Well, I dispute one and four.

THE COURT: It seems to the court that the procedure we should follow today would be to have the government put the agent who issued the summons[es], that's Mr. Donald Jackson, [*sic*] on the stand to determine whether the government has met the four criteria [of] enforceability set forth as I have just stated and to allow the Stuckey [*sic*] attorney to cross-examine the agent concerning his contacts with the Department of Justice to determine whether there is an illicit connection between the holding up of the drug case and the summons[es]. If, at the end of the examination of the agent, there exists in the court's mind a substantial question concerning the motives of the IRS, then I would adjourn the hearing and allow limited discovery.

If * * * no such question exists, the matter is at an end[,] and I think that under the *U.S.* v. *Church of Scientology* * * * the court seems to say that should be the procedure to follow.

I am not going to have a big protracted hearing. I want to know whether or not this is a pretext or not.

MR. YOUNGQUIST: Well, Your Honor, in order to determine that, I suggest the order of proof—

THE COURT: I am going to have the agent that issued the summons testify and listen to him. And if I am satisfied after that, then there is no reason for any further hearing.

MR. YOUNGQUIST: I, of course, accede to what Your Honor's order is with respect to that, but just let me say[,] as far as the order of proof goes, Mr. Jackson was a late entry in this tax matter. Mr. Utaski is the one that issued most of the summons[es].

THE COURT: Well, we will see what happens.

MR. YOUNGQUIST: But Mr. Caramucci is the man who interviewed Mr. Weinstein at the time of his arrest[,] where the inception of the criminal tax investigation started[.] And I would urge Your Honor that we start chronologically with the beginning of the tax investigation because that is the point [—] the legitimacy, the proper purpose of using summons[es] in this investigation for a purely criminal purpose [—] that is where I am challenging the government's not [being] able to show the proper purpose.

Now, Your Honor mentions the *Church of Scientology* case[,] and I have cited and quoted extensively, in my Memorandum prior to your order, the *Chase Manhattan Bank Case* in the Second Circuit, which came down last April or March[.] Based upon a long [exigesis] of the Supreme Court's decision in *LaSalle,* in that case which has * * * extremely parallel facts [to our case], * * * the [lower] court was required to go into [—] by an evidentiary hearing[,] limited, of course, in scope,[—] the allegations of the holding up of a criminal FBI investigation while summons[es] were served in an ostensible criminal tax investigation[.] The same sort of thing here[.] And we will not get that testimony developed in a comprehensible way so Your Honor can make an intelligent decision simply by starting with Mr. Jackson or Mr. Utaski. I would urge that we start with Mr. Caramucci and with Mr. Wallace, the DEA agent, because my initial allegation in my

Declaration was improper contact, improper passing of information by the IRS people to the DEA agent on the day of the arrest, or shortly thereafter[.] And I have evidence, Your Honor, through DEA reports, that that occurred notwithstanding the denials and the declarations that they have made.

I would propose, if Your Honor would allow me to follow my Order of Proof, I would propose to put my client, Mr. Weinstein, on the stand first to testify about the filing of his tax returns, because in Mr. Caramucci's referral report—

THE COURT: I don't need him. I don't need him. I am not interested in what he has to say. I am interested in the object of the IRS, whether it's a pretext, whether it's a pretext or not a pretext.

He has nothing to do with this case.

MR. YOUNGQUIST: What happened to Mr. Weinstein—

THE COURT: I am not interested in what happened to Mr. Weinstein. All I am interested in is a very limited purpose, what is the objective, the motivation of the IRS. That's all I am interested in.

If he doesn't know, nobody knows[.] [*Sic.* To government counsel:] What about these IRS statements? What do you think about all these statements?

MR. WEILL: A lot. I'm prepared to put Mr. Jackson on and Mr. Utaski in that order.

First he's incorrect. He—

THE COURT: You see, I don't want to go all over the drug part.

MR. WEILL: I don't either, Your Honor.

THE COURT: All I am interested in is a very limited part and that is what was the motivation of the IRS in this investigation?

That's what I am interested in and you may be interested in something else and somebody else might be interested—I am interested in that only and that's what we are going to do.

MR. WEILL: I am ready to proceed.

MR. YOUNGQUIST: Your Honor, one other thing I wanted to say. Under the *LaSalle National Bank* case, the key language is that the Internal Revenue Service is not an information-gathering agency for other government agencies including the Department of Justice.

I am saying that—

THE COURT: I am telling you this, that if the motivation of the Internal Revenue Service in the issuance of these summons[es] is the ascertainment and collection of information for the collection of a tax, that's proper. If a secondary thing they arrived at is they discover some criminal material, that's something else. That has nothing—that doesn't negate the whole operation of the summons. If their primary purpose here is to ascertain and collect a tax, that's fine.

MR. YOUNGQUIST: Where I have a heavy burden under *LaSalle,* Your Honor, is to demonstrate the institutional posture and the institutional bad faith, if you will, of the Service in issuing [these summonses.] But my submission to Your Honor—

THE COURT: That goes back to their motivation.

MR. YOUNGQUIST: That's right. But my submission, Your Honor, is the institutional purpose becomes broader than simply the Internal Revenue Service where you have clear evidence of Department of Justice interest in the case, [the] Department of Justice receiving information in the so-called criminal investigation. The institutional nexus is between the Department[s], and I am saying it's entirely possible, Your Honor, that the Internal Revenue Service[,] with possible good motive or naive motive can be drafted into a situation where that is what the overwhelming weight of the evidence looks like, is that they are gathering this information for the U.S. Attorney.

THE COURT: Well, that might be one thing you can say about the IRS. I don't think you can say they are naive.

MR. YOUNGQUIST: No, I don't think you can either, Your Honor.

THE COURT: Let's hear your first witness.

MR. WEILL: Mr. Jackson, please.

* * *

THE COURT: Counsel, the purpose of this hearing is a limited purpose. We are going way far afield. I want to know if there is any bad faith or if there is any nexus between the two.

I haven't found any so far. [To government counsel:] Have you got another witness so we can proceed?

Otherwise the matter will be concluded.

MR. YOUNGQUIST: Well, Your Honor, I would like to proceed with Mr. Utaski.

THE COURT: Well, no. I am going to cut the hearing off at this particular juncture. The purpose of the hearing is to sift out the evidence, if there is any, of harassment or improper purpose that can be substantiated to avoid dilatory or discovery matters and to see whether or not the purpose of the summons[es] were to assist the government[.] And we have had both the people on the stand that have issued the summons[es] and I find no bad faith on their part, nor any purpose to assist the government in the drug case[.] And thereby, the Court orders the government's Petition for Enforcement of Summons[es] is granted.

MR. YOUNGQUIST: Your Honor, may I make this request? I wish to make my offer of proof on this matter in view of the *Chase Manhattan* case[.] I do not think we have had a complete hearing on the matter and I would like—

THE COURT: Fine.

MR. YOUNGQUIST: —to make my offer of proof and I would ask to save time, Your Honor, if you will just leave the record open, I will make it in writing[,] and that can be included in the record if that would be the order.

THE COURT: All right. So ordered.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED
Sep 24, 1979
Clerk, U.S. DIST. COURT
SAN FRANCISCO

UNITED STATES OF AMERICA and DONALD JACKSON, Special Agent,

Petitioners,

v.

CHARLES H. STUCKEY, CROCKER NATIONAL BANK, GIBRALTAR SAVINGS & LOAN, SECURITY PACIFIC NATIONAL BANK, UNION BANK and COMMERCIAL BANK OF SAN FRANCISCO,

Respondents.

MORRY P. WEINSTEIN,

Intervenor.

No. C-79-982-SC

ORDER ENFORCING SUMMONSES

This cause having duly come on for hearing on September 21, 1979, upon the return of an Amended Order to Show Cause heretofore issued by this Court and Order dated September 7, 1979, and the Court having considered the record herein, including the verified petition to enforce herein, including the verified petition to enforce Internal Revenue summonses, declarations filed by both petitioners and taxpayer-intervenor, as well as the testimony of petitioner Donald Jackson and Internal Revenue Service Special Agent Thomas J. Utaski, the Court hereby finds:

That the Internal Revenue Service summonses sought to be enforced by this petition were issued in good faith since the Internal Revenue Service was not acting as an information-gathering agency for the Department of Justice as alleged by the taxpayer-intervenor. Accordingly, the petition is GRANTED and it is hereby:

ORDERED that respondents shall appear before petitioner DONALD JACKSON at a time, place or places to be designated by said petitioner to said respondents, and then and there give testimony relating to the matters described in the subject Internal Revenue summonses, true copies of which are attached hereto as *Exhibits A, B, C, D, E, F,* and *G,* and to produce for petitioner's inspection and copying respondents' records also described in the subject Internal Revenue Service summonses.

ORDERED that each party shall bear its own costs of this proceeding.

ORDERED this 24 day of September, 1979, at San Francisco, California.

SAMUEL CONTI

United States District Judge

[Exhibits omitted]

APPENDIX C

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6103. CONFIDENTIALITY AND DISCLOSURE OF RETURNS AND RETURN INFORMATION.

(a) GENERAL RULE.—Returns and return information shall be confidential, and except as authorized by this title—

(1) no officer or employee of the United States,

(2) no officer or employee of any State or of any local child support enforcement agency who has or had access to returns or return information under this section, and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), subsection (m)(4)(B), or subsection (n), shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

(b) DEFINITIONS.—For purposes of this section—

(1) RETURN.—The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) RETURN INFORMATION.—The term "return information" means—

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments,

or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110,

but such term does not include data in a form which cannot be associated with, or other wise identify, directly or indirectly, a particular taxpayer.

(3) TAXPAYER RETURN INFORMATION.—The term "taxpayer return information" means return information as defined in paragraph (2) which is filed with, or furnished to, the Secretary by or on behalf of the taxpayer to whom such return information relates.

(4) TAX ADMINISTRATION.—The term "tax administration"—

(A) means—

(i) the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party, and

(ii) the development and formulation of Federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions, and

(B) includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions.

* * *

(7) INSPECTION.—The terms "inspected" and "inspection" mean any examination of a return or return information.

(8) DISCLOSURE.—The term "disclosure" means the making known to any person in any manner whatever a return or return information.

(9) FEDERAL AGENCY.—The term "Federal agency" means an agency within the meaning of section 551(1) of title 5, United States Code.

* * *

(i) DISCLOSURE TO FEDERAL OFFICERS OR EMPLOYEES FOR ADMINISTRATION OF FEDERAL LAWS NOT RELATING TO TAX ADMINISTRATION.—

(1) NONTAX CRIMINAL INVESTIGATION.—

(A) INFORMATION FROM TAXPAYER.—A return or taxpayer return information shall, pursuant to, and upon the grant of, an ex parte order by a Federal district court judge as provided by this paragraph, be open, but only to the extent necessary as provided in such order, to officers and employees of a Federal agency personally and directly engaged in, and solely for their use in, preparation for any administrative or judicial proceeding (or investigation which may result in such a proceeding) pertaining to the enforcement of a specifically designated Federal criminal statute (not involving tax administration) to which the United States or such agency is or may be a party.

(B) APPLICATION FOR ORDER.—The head of any Federal agency described in subparagraph (A) or, in the case of the Department of Justice, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General, may authorize an application

to a Federal district court judge for the order referred to in subparagraph (A). Upon such application, such judge may grant such order if he determines on the basis of the facts submitted by the applicant that—

(i) there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed;

(ii) there is reason to believe that such return or return information is probative evidence of a matter in issue related to the commission of such criminal act; and

(iii) the information sought to be disclosed cannot reasonably be obtained from any other source, unless it is determined that, notwithstanding the reasonable availability of the information from another source, the return or return information sought constitutes the most probative evidence of a matter in issue relating to the commission of such criminal act.

However, the Secretary shall not disclose any return or return information under this paragraph if he determines and certifies to the court that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation.

(2) RETURN INFORMATION OTHER THAN TAXPAYER RETURN INFORMATION.—Upon written request from the head of a Federal agency described in paragraph (1) (A), or in the case of the Department of Justice, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General, the Secretary shall disclose return information (other than taxpayer return information) to officers and employees of such agency personally and directly engaged in, and solely for their use in, preparation for any administrative or judicial proceeding (or investigation which may result in such a proceeding) described in paragaph (1) (A). Such request shall set forth—

(A) the name and address of the taxpayer with respect to whom such return information relates;

(B) the taxable period or periods to which the return information relates;

(C) the statutory authority under which the proceeding or investigation is being conducted; and

(D) the specific reason or reasons why such disclosure is or may be material to the proceeding or investigation.

However, the Secretary shall not disclose any return or return information under this paragraph if he determines that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation. For purposes of this paragraph, the name and address of the taxpayer shall not be treated as taxpayer return information.

(3) DISCLOSURE OF RETURN INFORMATION CONCERNING POSSIBLE CRIMINAL ACTIVITIES.—The Secretary may disclose in writing return information, other than taxpayer return information, which may constitute evidence of a violation of Federal criminal laws to the extent necessary to apprise the head of the appropriate Federal agency charged with the responsibility for enforcing such laws. For purposes of the preceding sentence, the name and address of the taxpayer shall not be treated as taxpayer return information if there is return information (other than taxpayer return information) which may constitute evidence of a violation of Federal criminal laws.

(4) USE IN JUDICIAL OR ADMINISTRATIVE PROCEEDING.—Any return or return information obtained under paragraph (1), (2), or (3) may be entered into evidence in any administrative or judicial proceeding pertaining to enforcement of a specifically designated Federal criminal statute (not involving tax administration) to which the United States or an agency described in paragraph (1)(A) is a party but, in the case of any return or return information obtained under paragraph (1), only if the

court finds that such return or return information is probative of a matter in issue relevant in establishing the commission of a crime or the guilt of a party. However, any return or return information obtained under paragraph (1), (2) or (3) shall not be admitted into evidence in such proceeding if the Secretary determines and notifies the Attorney General or his delegate or the head of such agency that such admission would identify a confidential informant or seriously impair a civil or criminal tax investigation. The admission into evidence of any return or return information contrary to the provisions of this paragraph shall not, as such, constitute reversible error upon appeal of a judgment in such proceeding.

* * *

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at a law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) JURISDICTION OF DISTRICT COURT.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, records, or other data.

* * *

SEC. 7609. SPECIAL PROCEDURES FOR THIRD-PARTY SUMMONSES

(a) NOTICE.—

(1) IN GENERAL. If—

(A) Any summons described in subsection (c) is served on any person who is a third-party record-keeper, and

(B) the summons requires the production of any portion of records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in the description of the records contained in the summons, then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 14th day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain directions for staying compliance with the summons under subsection (b)(2).

(2) SUFFICIENCY OF NOTICE.—Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 (relating to service of summons) upon the person entitled to notice, or

is mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left with the person summoned. If such notice is mailed, it shall be sufficient if mailed to the last known address of the person entitled to notice or, in the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to the last known address of the fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence.

(3) THIRD-PARTY RECORDKEEPER DEFINED.—For purposes of this subsection, the term "third-party recordkeeper" means—

(A) any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law, any bank (as defined in section 581), or any credit union (within the meaning of section 501(c)(14)(A));

(B) any consumer reporting agency (as defined under section 603(d) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)));

(C) any person extending credit through the use of credit cards or similar devices;

(D) any broker (as defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)));

(E) any attorney; and

(F) any accountant.

(4) EXCEPTIONS.—Paragraph (1) shall not apply to any summons—

(A) served on the person with respect to whose liability the summons is issued, or any officer or employee of such person,

(B) to determine whether or not records of the business transactions or affairs of an identified person have been made or kept, or

(C) described in subsection (f).

(5) NATURE OF SUMMONS.—Any summons to which this subsection applies (and any summons in aid of collection described in subsection (c)(2)(B)) shall identify the taxpayer to whom the summons relates or the other person to whom the records pertain and shall provide such other information as will enable the person summoned to locate the records required under the summons.

(b) RIGHT TO INTERVENE; RIGHT TO STAY COMPLIANCE.—

(1) INTERVENTION.—Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) RIGHT TO STAY COMPLIANCE.—Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to stay compliance with the summons if, not later than the 14th day after the day such notice is given in the manner provided in subsection (a)(2)—

(A) notice in writing is given to the person summoned not to comply with the summons, and

(B) a copy of such notice not to comply with the summons is mailed by registered or certified mail to such person and to such office as the Secretary may direct in the notice referred to in subsection (a)(1).

* * *

(d) RESTRICTION ON EXAMINATION OF RECORDS.—No examination of any records required to be produced under a summons as to which notice is required under subsection (a) may be made—

(1) before the expiration of the 14-day period allowed for the notice not to comply under subsection (b)(2), or

(2) when the requirements of subsection (b)(2) have been met, except in accordance with an order issued by a court of competent jurisdiction authorizing examination of such records or with the consent of the person staying compliance.

(e) SUSPENSION OF STATUTE OF LIMITATIONS.—If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

* * *

(h) JURISDICTION OF DISTRICT COURT.—

* * *

(2) Except as to cases the court considers of greater importance, a proceeding brought for the enforcement of any summons, or a proceeding under this section, and appeals, take precedence on the docket over all cases and shall be assigned for hearing and decided at the earliest practicable date.

Opposition

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 81-1059

In the Supreme Court of the United States

OCTOBER TERM, 1981

MORRY P. WEINSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA AND DONALD JACKSON, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Department of Justice
Washington, D.C. 20530
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TABLE OF AUTHORITIES

Page

Cases:

United States v. *Chemical Bank*, 593 F. 2d 451 .. 5

United States v. *Church of Scientology of California*, 520 F. 2d 818 4

United States v. *Daffin*, 653 F. 2d 121 ..... 3, 4

United States v. *DeLesi*, No. 80-1571 (10th Cir. Nov. 27, 1981) 5

United States v. *Genser*, 595 F. 2d 146, cert. denied, 444 U.S. 928 ..... 3, 4

United States v. *Harris*, 628 F. 2d 875 3

United States v. *Kis*, 658 F. 2d 526 3

United States v. *LaSalle National Bank*, 437 U.S. 298 5

United States v. *Security Bank & Trust Co.*, 661 F. 2d 847 3

United States v. *Southeast First National Bank*, 665 F. 2d 661 3

Statute:

Internal Revenue Code of 1954 (26 U.S.C.):

Section 6103(i) 2, 4, 5
Section 7609 2

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

In this internal revenue summons enforcement case, petitioner seeks review of the decision below denying him prehearing discovery and limiting the scope of the evidentiary hearing conducted by the district court. In so holding, the court of appeals cited the district court's findings that there was a substantial basis for the Internal Revenue Service's investigation and that the Service was not improperly acting as an information-gathering agency with respect to a contemporaneous non-tax criminal investigation.

The relevant facts may be summarized as follows: Petitioner is a tax attorney who was apprehended for alleged possession of hashish. Together with the drugs involved, the Drug Enforcement Administration (DEA) agents seized cash and various bank receipts. The DEA notified the Internal Revenue Service of the arrests, and petitioner was interviewed by a revenue agent. When the revenue agent was unable to find any record that petitioner filed income

tax returns for 1975 and 1976, he referred petitioner's case to the Criminal Investigation Division of the Internal Revenue Service. The investigation was first assigned to Special Agent Utaski and then to Special Agent Jackson. During the course of the investigation, summonses were issued to various individuals and banks in an attempt to gain access to records of petitioner's financial transactions (Pet. App. 2a-3a).

While the Internal Revenue Service investigation was in progress, petitioner was indicted on drug charges which were later dismissed without prejudice. After the dismissal, the Assistant United States Attorney, acting pursuant to Section 6103(i) of the Internal Revenue Code of 1954 (26 U.S.C.), obtained an ex parte order allowing him access to information gathered by the Internal Revenue Service (Pet. App. 2a).

Following the issuance of the summonses, petitioner asked the summoned parties not to provide the information sought (see 26 U.S.C. 7609). The government thereupon brought this action in the United States District Court for the Northern District of California, seeking enforcement of the summonses. Petitioner intervened alleging that the summonses were issued to harass him and to aid the DEA in its non-tax criminal investigation.

The district court determined that a limited hearing would be held to allow petitioner to examine certain government witnesses (Pet. App. 3a). After Special Agent Jackson and Special Agent Utaski had been examined and cross-examined at some length (but before petitioner's attorney had finished cross-examination), the district court stated that it had seen no evidence of bad faith or harassment and that it was terminating the hearing and would be ordering the summonses enforced (Pet. App. 3a-4a). After objecting to the termination of the proceedings, petitioner

was permitted to make a written offer of proof (Pet. App. 4a). The district court thereupon terminated the hearing and ordered the summonses enforced. The court of appeals affirmed, with one judge dissenting (Pet. App. 1a-38a).

1. Petitioner seeks review by this Court claiming (Pet. 12) that the various courts of appeals are in "disarray" with respect to both substance and procedure in summons enforcement proceedings. But there is no such "disarray" or conflict. The courts of appeals are in agreement as to the basic discovery which should be provided to individuals opposing the enforcement of summonses. Compare *United States* v. *Genser*, 595 F. 2d 146, 152 (3d Cir.), cert. denied, 444 U.S. 928 (1979), with *United States* v. *Kis*, 658 F. 2d 526 (7th Cir. 1981); *United States* v. *Southeast First National Bank*, 655 F. 2d 661, 667-668 (5th Cir. 1981), and *United States* v. *Security Bank & Trust Co.*, 661 F. 2d 847, 850-853 (10th Cir. 1981).

The only difference among the courts relates to the precise procedure to be followed in providing the basic discovery to litigants. Some courts have held that this information is to be provided by discovery (see *Genser* and *Kis, supra*). Others have concluded that the information may be elicited by the examination of government witnesses at a hearing (see, *e.g.*, *Southeast First National Bank, supra*). But this divergence in procedure does not constitute a conflict. Indeed, the two procedures have been recognized to be "substantial[ly] equivalent." *United States* v. *Daffin*, 653 F. 2d 121, 124 (4th Cir. 1981), quoting *United States* v. *Harris*, 628 F. 2d 875, 883 (5th Cir. 1980). See also the discussion in *Harris, supra*, 628 F. 2d at 880-884. At all events, petitioner does not allege that he would have prevailed under the rule of any other court of appeals nor does it appear that he has been denied information to which some other court of appeals would conclude that he has a right.

2. Petitioner also suggests (Pet. 13-14) that the district court's termination of the evidentiary hearing denied him a meaningful hearing and violated his right to due process. Petitioner had been allowed to cross-examine both special agents and had, at that point, either been provided or had elicited all of the information to which he was entitled under *Genser, supra*, and its progeny. Although the Internal Revenue Service files were made available to an Assistant United States Attorney, it was clear that this was done in compliance with a court order, obtained under the statutory procedure set forth in Section 6103(i) of the 1954 Code (CR 26 and Exhibits).[1] Further, it was also clear that the Internal Revenue Service agents were not investigating at the behest of, or under the direction of, the Department of Justice (Pet. App. 10a).

The scope of an evidentiary hearing in a summons enforcement proceeding is a matter subject to the discretion of the district court. See *United States* v. *Church of Scientology of California*, 520 F. 2d 818, 820 (9th Cir. 1975). Here, where, as the court of appeals observed, the good faith of the Internal Revenue Service was "irrebuttably demonstrated by Agent Utaski's testimony" (Pet. App. 10a), it would have been fruitless for the district court to have continued a hearing which had become a meaningless exercise. Having made a determination that the testimony before him was credible and demonstrated good faith, the district court properly terminated the inquiry. *Daffin, supra*, 653 F. 2d at 124.[2]

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[1] "CR" references are to documents by the number assigned to them in the Clerk's Record.

[2] Although the termination of the hearing ended petitioner's opportunity to present evidence, he does not contend that he had any additional evidence to present which would have carried his burden of proving bad faith, nor does an examination of his written offer of proof disclose such evidence.

3. Finally, petitioner suggests (Pet. 19-20) that the disclosure of information collected by the Internal Revenue Service pursuant to Section 6103(i) conflicts with this Court's ruling in *United States* v. *LaSalle National Bank*, 437 U.S. 298, 317 (1978), that the "good-faith standard will not permit the IRS to become an information-gathering agency for other departments." The suggestion, however, ignores the differences between the case where, as here, the Internal Revenue Service shares with other agencies information it had developed in pursuit of its own proper objectives and the case where the Internal Revenue Service abandons any pursuit of its own proper objectives and functions as an investigatory agent for other agencies. In *LaSalle National Bank*, the Court addressed the latter case. Nothing here suggests that the Service has abandoned its pursuit of a proper tax investigation. Accord, United States v. *DeLisi*, No. 80-1571 (10th Cir. Nov. 27, 1981), slip op. 10-11, and *United States* v. *Chemical Bank*, 593 F. 2d 451, 456-459 (2d Cir. 1979).

Moreover, the "good faith" to which the Court referred in *LaSalle National Bank, supra*, focuses upon the "good-faith pursuit of the congressionally authorized purpose of §7602." See 437 U.S. at 317-318 n.19. By enacting Section 6103(i), Congress has made it clear that the Internal Revenue Service may properly furnish certain information to other government agencies.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1982

DOJ-1982-01